



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

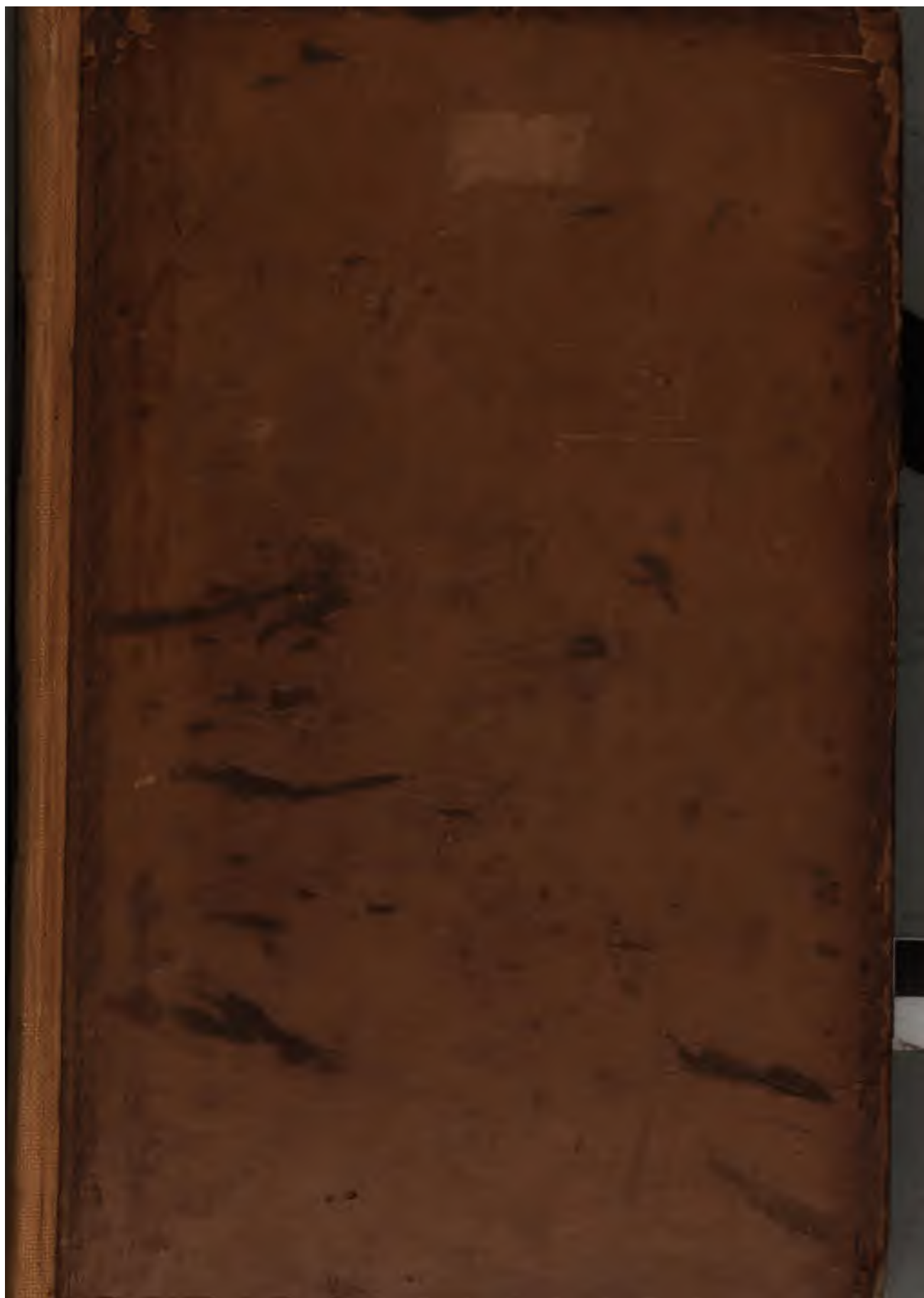
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



LL.

L. Eng. A75 d.  $\frac{735}{3}$

OW.U.K.

100

T.15.







**R E P O R T S**

OF

**C A S E S**

ARGUED AND DETERMINED

IN THE

**Court of Common Pleas,**

AND

**OTHER COURTS,**

FROM TRINITY TERM, 50 GEO. III. 1810,  
TO EASTER TERM, 51 GEO. III. 1811,

BOTH INCLUSIVE.

With Tables of the Cases and Principal Matters.

---

By WILLIAM PYLE TAUNTON,

OF THE MIDDLE TEMPLE, ESQ. BARRISTER AT LAW.

---

VOL. III.

---

---

LONDON:

PRINTED FOR J. BUTTERWORTH AND SON, LAW BOOKSELLERS,

43, FLEET-STREET;

AND J. COOKE, ORMOND-QUAY, DUBLIN.

1818.



**R E P O R T S**  
**OF**  
**C A S E S**  
**ARGUED AND DETERMINED**  
**IN THE**  
**COURT OF COMMON PLEAS,**  
*&c. &c.*

**G. WOODFALL, PRINTER, ANGEL COURT, SKINNER STREET, LONDON.**

# **JUDGES**

**OF THE**

## **COURT OF COMMON PLEAS,**

**DURING THE PERIOD CONTAINED IN THIS VOLUME.**

---

**Right Hon. Sir JAMES MANSFIELD, Knt. Ld. Ch. J.**

**Hon. JOHN HEATH, Esq.**

**Hon. Sir SOULDAN LAWRENCE, Knt.**

**Hon. Sir ALAN CHAMBRE, Knt.**



A

# TABLE

OF THE

## NAMES OF THE CASES

REPORTED IN THIS VOLUME.

---

N. B. The Cases, the Names of which are printed in *Italics*, are printed or cited from MS. Notes.

	Page		Page
A			
<b>A</b> BRAHAMS, Halhead v.	81	Barber, Cooper v.	99
Aguilar, Feise and another v.	506	Barnes, Gould and others, Administrators of Robinson v.	504
Ahitbol v. Benedetto	225	Beauchamp v. Tomkins and another	141
Allen v. Bennett	169	Bell, Foy v.	493
Allen, Doe ex dem. Sheppard, v.	78	Benedetto, Ahitbol v.	225
Allnutt, Hagedorn v.	379	Bennett, Allen v.	169
Allnutt, Violet v.	419	Bentinck, (Lord W.C.) Oliver v.	466
Annan v. Woodman	299	Berry, Bridges v.	130
Anonymous ( <i>Motion to put off Trial</i> )	315	Bissell, Morgan, on the demiee of Dowding, v.	65
Anonymous ( <i>Recovery</i> )	419	Birch and others v. Stephenson and others	469
( <i>Affidavit</i> )	469	Blagrove, demandant; Owen, tenant; Blagrove and others, vouches	302
Arrowsmith v. Ingle	234	Boughton v. Sandilands	342
Aubert v. Walsh	277	Bourdillon, Fayle and another v.	546
Aylett, Callaghan v.	397	Brain, Cox v.	95
B			
Bailiff and Burgesses of Morpeth, Doe ex dem. Lord Carlisle v.	378	Bridges v. Berry	130
Barber v. Barber and another	466	Brocke, Webb v.	6
		Buckney (Executrix) v. Metham	383
		<i>Buller v. Fisher</i>	4



## TABLE OF THE CASES REPORTED.

	Page		Page
Mayor of Doncaster v. Day	262	Payne, demandant; Nathaniel,	
Mellish v. Staniforth	499	tenant; Hodges, vouchee	396
Merrill, Gibbs v.	307	Peale, De Rouffigny v.	484
Metham, Buckney executrix v.	383	Pearce v. Hooper and others	60
Mewes, Rex v. Davey in the cause of Hacket v.	112	Perrott, Hill v.	274
Miller v. Robe and another	461	Plunkett, Vaughan v.	85
Miller, Vowles v.	137	Preston, vouchee; Horne, de- mandant; Lodge, tenant	462
Montague v. Janverin	442	Price, tenant; Rawlings, de- mandant; Tom and others, vouchees	59
Moor, Saxelby v.	51	Prior and wife (Doc on the de- mise of) v. Salter	485
Morell v. Dubost and Sonnerat	235	Prosser, Clerk, v. Goringe	426
Morgan on the demise of Dow- ding v. Bissell	65	Pywewell v. Stow	425
Morgan and others, Assignees of Hunt v. Horseman and others	241		
Morpeth, (Bailiffs and Bur- gesses of) Doe on the demise of Lord Carlisle v.	378	R	
Morris v. Edgington	24	Ramsbottom, Howard v.	526
Muller v. Gernon ( <i>Security for costs</i> )	272	Rawlings, demandant; Price, tenant; Tom and others, vouchees	59
(Licence to <i>import</i> )	394	Rees, (one of the bail of Sir W. Mansell, Bart.), Waters v.	508
N		Regula Generalis ( <i>Bail above 1000l.</i> )	341
Nantes, Cousins v.	513	(Justifying <i>Bail</i> )	569
Nathaniel, tenant; Payne, de- mandant; Hodges, vouchee	396	Rex v. Davey in the cause of Hacket v. Mewes	112
Neesom v. Whytock	403	Rhodes, Thomas v.	478
Nelson, Jacobs v.	423	Ritchie, Laughton v.	385
Nokes, plaintiff; Styles, widow, deforçant	40	Robe and another, Miller v.	461
Norrish, Dick v.	464	Robbard, Cox v.	74
O		Roe, Doe on the demise of Ledger, v.	508
Oakes, Duffy v.	166	Roc, Doe on the demise of Whitfield, v.	402
O'Callaghan v. Marchioness Thomond	82	Roper v. Burnford	76
Olliver v. Lord W. C. Bentinck	456	Rousby, vouchee; Tennyson, demandant; Coulton, tenant	408
Oulds and others v. Sansom	261	Russel, Smith v.	400
Owen, tenant; Blagrove, de- mandant; Blagrove and others, vouchees	302	S	
Oxenden, Doe on the demise of Chicester, Bart, v.	147	Salter, Doe on the demise of Prior and Wife, v.	485
P		Samuels v. Dunne	386
Packwood and another, Harris v.	264	Sandilands, Boughton v.	342
Parry, Haddow v.	302	Sansom, Oulds and others v.	261
		Sauvage v. Dupuis	410
		Saxelby	

# TABLE OF THE CASES REPORTED.

vii

	Page		Page
Saxelby v. Moor	51	Tom and others, vouchees;	
Scott v. Gilmore	226	Rawlings, demandant; Price,	
Senhouse, Gairdner and another v.	16	tenant	59
Serres, Wilson v.	507	Tomkins and another, Beauchamp v.	141
Shaw, tenant; —, demandant;		Townsend, Hill v.	45
Hawkins, vouchee	74		
Sherborne v. Siffkin	525	V	
Sheppard, Doe on the demise of, v. Allen	78	Vaughan v. Plunkett	85
Simeon, Mayor v.	497	Venn v. Warner	263
Slack v. Lowell	157	Vine and others (Doe on the demise of) v. Figgins and Sloper	440
Smith v. Russell	400	Violet v. Allnutt	419
Smith v. Spooner	246	Vowles v. Miller	137
Sonnerat and Dubost, Morell v.	235		
Soulsby, Assignee of Halliday, a Bankrupt, v. Lee	86	W	
Southcote, Executrix, &c. v. Hoare, Bart.	87	Waldron and another v. Coombe	162
Spilsbury, Wilson v.	145	Walsh, Aubert v.	277
Spitta v. Woodman	406	Warner, Venn v.	263
Stafford, Marquis of, Swinerton v.	91. 246	Wakon, Hinckley v.	131
Staniforth, Mellish v.	232	Waters v. Sir W. Mansell, Bart.	56
Steel v. Lacy ( <i>Security for Costs</i> )	273	Waters v. Rees, one of the bail of Sir W. Mansell, Bart.	593
Steel v. Lacy ( <i>Licence to carry simulated Papers</i> )	285	Webb v. Brooke	6
Stephenson and others, Birch and others v.	469	Whayman (Doe on the demise of) v. Chaplin	120
Stevens v. Ingram	384	White and others v. Howard	339
Stevens, Hunt, Administrator of Campbell, v.	113	Whitfield (Doe on the demise of) v. Roe	402
Steyner v. Cottrell	377	Whitmore, Goldsmith v.	508
Stone, Gwillim v.	433	Whitmore, Thompson v.	227
Stow, Pyewell v.	425	Whytock, Neeson v.	403
Styles, Widow, deforciant; Nokes, plaintiff	49	Williams v. Burgess	127
Swinerton v. Marquis of Stafford	91. 232	Williams, Garrick v.	540
		Wilson v. Spilsbury	145
T		Wilson v. Serres	307
Tennyson, demandant; Goulton, tenant; Rousby, vouchee	408	Winstandley v. Head	237
Thackwaite v. Cock and others	487	Winter v. Mair	531
Thomas v. Rhodes	478	Wontner and Hoppe, bail of Wilson, Clarke v.	46
Thomond, Marchioness, O'Callaghan v.	82	Wood and others, Dawson v.	56
Thompson v. Whitmore	227	Woodman, Annan v.	299
		Woodman, Spitta v.	406
		Wykham v. Wykham and others	316
		Y	
		Yates, Leer v.	237

**ERRATUM.**

---

**Vol. I. pp. 378, 379. margin, for *Norden v. Williamson and Twibill*, read *Norden and Twibill v. Williamson*.**

# C A S E S

ARGUED AND DETERMINED

1810.

IN THE

COURTS OF COMMON PLEAS,

AND

EXCHEQUER-CHAMBER,

IN

Trinity Term,

In the Fiftieth Year of the Reign of GEORGE III.

---

COLLINSON and Others v. LARKINS.

June 22.

**T**HIS was an action upon the case, brought by the plaintiff, who was the owner of a vessel called the *Susannah*, against the defendant, who was the owner of an *East Indiaman* called the *Larkins*. The declaration charged that while the plaintiff and defendant were navigating their respective vessels on the high seas, the defendant, by his servants, took so little and such bad care of his ship, in the direction and management thereof, that the same, by and through the carelessness, misdirection, and mismanagement of the defendant, by his servants, ran foul of and injured the Plaintiff's ship, whereby she was obliged to abandon her voyage, and make for the nearest port to refit. Upon the trial of this cause at *Guildhall*, at the sittings after last *Easter* term, before *Mansfield*, C. J., it was proved that the plaintiff's vessel was one of a numerous fleet, sailing under convoy of the *Mercury* frigate; that they had general sailing orders that no vessel was to go before the *Mercury's* beam; that on the 31st of *January*, the fleet then being in the chops of the *Channel*, about six in the even-

If a vessel is damaged by another running foul of it, and the jury find a verdict for the plaintiff, the Court will not send the case to a new trial because there may be some ground to believe that the plaintiff was negligent in navigating his vessel, as well as the defendant.

[ 2 ]

1810.  
 COLLINSON  
 v.  
 LARKINS.

ing, (the weather being hazy, the wind fresh, and the moon new,) the *Mercury* made a signal for all the vessels of the convoy to pass within hail, and shortened sail in order to give them time to come up; that each vessel as it successively came up, in order to avoid shooting a-head of the *Mercury*, contrary to the general orders, was obliged to practise some manœuvre to enable her to lie by until the rest of the fleet should have come within hail, and until the *Mercury* should again proceed on her course: that for this purpose the *Susannah* first bore away for half an hour, and afterwards lay-to; that the defendant's vessel, which was of greater burthen, having on that evening joined the convoy, was proceeding to head the fleet, in consequence, as the defendants alleged, of an order issued by the captain of the *Mercury*; and that after it was dark, while the *Susannah* was lying-to, directly athwart the course of the *Larkins*, with her head nearly to the wind, and all his sails aback, and consequently not in a condition to be put into instant motion to avoid any approaching danger; the *Larkins*, which was then sailing at the rate of 7 or 8 knots an hour, with her larboard bow struck the *Susannah* about the midships, and did her considerable damage. Witnesses, who were on board the *Susannah*, stated that they could discern the *Larkins* at the distance of nearly half a mile to the windward: that they, at that time, had a single candle in a lanthorn on their own fore-castle, and that they saw a light near the poop of the *Larkins*, but no other lights: that when they saw her coming down on them, the whole crew of the *Susannah* hailed her as loudly as possible, at which time, if the crew of the *Larkins* had been attending to the ship's course, they could easily have passed either a-head or a-stern of the *Susannah*; but that the crew of the *Larkins* did not perceive their signals. It was proved, however, that the *Larkins* had three men on the look-out during that time; but the darkness of the night, and haziness, prevented their seeing the *Susannah*; and the wind prevented their hearing the voices of her crew, until before the collision, when a sailor on board the *Larkins* exclaimed that there was a ship close under her bows. The crew of the *Larkins* immediately did every thing that they could to divert her course, but the distance between the ships at this time not exceeding 200 yards, they could not so change her course as to keep her altogether clear of the *Susannah*, but their efforts diminished the injury, by causing the *Larkins* to come down obliquely, instead of directly on her. It appeared that two days after the accident, the captain of the *Larkins*, who was an officer

[ 3 ]

of great experience, did receive orders from the captain of the *Mercury* to lead the fleet.

*Shepherd*, Serjt., for the plaintiff, upon these facts contended that the crew of the *Larkins* had been inattentive to their duty, and that their negligence was the cause of the accident. Remarks were also made on the date of the orders for the *Larkins* to take the lead. *Lens*, Serjt., for the defendant, on the other hand, relied on the circumstance of his having been acting in pursuance to orders of a superior authority in shaping his course as he had done: that the plaintiff had been guilty of negligence in not displaying lights in a signal lanthorn, and in lying-to in the midst of a numerous convoy, a situation in which he ought not to have disabled himself from escaping such accidents as may unavoidably occur in a crowded fleet: much less ought he to have placed his vessel exactly athwart their course. The jury, however, found a verdict for the plaintiff, subject to a reference as to the amount of the damage sustained.

*Lens* now moved to set aside the verdict, and to have a new trial. The utmost that was contended at trial for the plaintiffs, he said, was, that the captain of the *Susannah* was not highly blameable in lying-to; but it is necessary that there should have been some positive misfeasance on the part of the defendant to entitle the plaintiff to recover in this action. He mentioned the case of *Buller v. Fisher*, B. R. 1798., which was an action brought against the defendants, owners of the brig *Atlas*, for not delivering goods entrusted to them to be carried on freight on board that vessel, wherein a special verdict was found, that whilst the ship was proceeding on her voyage, the ship and goods were sunk in the sea, and wholly lost to the plaintiffs, which sinking and loss was occasioned by the *Atlas* and a certain other ship called the *Patriot* running foul of each other upon the high seas, no blame being imputable to either of the said ships' companies. The cause, by the direction of the Court of King's Bench, then went down to another trial, in order to have it specially found whether the loss were occasioned by a peril of the sea or not. The plaintiffs praying the direction of the Chief Justice, Lord *Kenyon*, whether, in law, these facts amounted to a peril of the sea; and his Lordship declaring his intention to leave it to the jury as a question of fact, whether these circumstances were a peril of the sea or not, the plaintiff submitted to be nonsuited, and the case was never ultimately determined, and it is cited only for the sake of the general doctrine, that there must be some-

1810

COLLINSON  
v.  
LARKINS.

[ 4 ]

*Buller v. Fisher*,  
B. R. 1798.

1810.

COLLISON  
v.  
LARKINS.

[ 5 ]

thing blameable on the side of the defendant, in order to enable the plaintiff to recover. But even if the defendant were blameable here, yet if there were blame in both parties, and the misfeasance of both concurs to produce the mischief, then it follows as a consequence of law that the one can recover no damages against the other, and there ought to be a new trial upon that ground, because the action cannot be sustained.

MANSFIELD, C. J. I should have no objection to this cause being tried again, if I thought any new light could be thrown upon it; and had I been on the jury I should have made such allowances for the darkness of the night, that I should have found for the defendant, attributing the cause to mere accident, and a dark foggy night. There was some contradiction between the witnesses as to the distance at which the ships first discovered each other and hailed. It was attempted to insinuate that the defendants tried to delude the plaintiffs by concealing the name of their ship; but this insinuation was afterwards completely done away. Two masters of the *Trinity House*, who were present during the trial, thought that the *Susannah* did wrong in lying-to; but they thought that the *Larkins* did not do quite right in going seven knots an hour in the middle of a convoy, in a thick foggy night; because her going so fast might be the very reason why her crew could not prevent the accident; if she had been going slower they might have been able to wear ship in time. They therefore thought both parties were in some measure blameable.

HEATH, J. *Interest reipublicæ, ut sit finis litium.*

LAWRENCE, J. In this case it is evident, from the opinion of the gentlemen of the *Trinity House*, that the captain of the *Larkins* was acting very imprudently in running at this rate through the fleet; and we do not know but that the *Susannah* might have had very good reasons for lying-to.

Rule refused.

[ 6 ]

June 25.

WEBB v. BROOKE.

The plaintiff and defendant being taken prisoners in Portugal, jointly solicited and obtained the li-

beration of themselves and the ransom of the defendant's ship, contrary to 45 G. 3. c. 72. to effect which the plaintiff lent money to the defendant, who afterwards gave him a bill for the amount. Held that the plaintiff could not recover on the bill.

THIS was an action upon a bill of exchange for 3000 dollars, payable to the defendant's order, by whom it was drawn upon *Parsons*, and indorsed to the plaintiff, and which *Parsons* had refused to accept. This cause was tried at *Guildhall*, at the

sittings

sittings after last *Hilary* term, before *Mansfield*, C. J., upon the admissions of the parties, which were in substance, that in *April* 1809, Marshal *Soult*, Duke of *Dalmatia*, entered *Oporto*, and made prisoners of all the resident *English*, among whom were the plaintiff, a merchant, and the defendant, master of the ship *Little Mary*, together with his vessel. A petition was presented to *Soult*, in which the petitioners on behalf of themselves and their unfortunate countrymen, being few in number, and those few always employed in the merchant service, and not carrying arms against the Emperor of *France* or his allies, solicited their liberty; stating that they had one vessel there in ballast, which would be sufficient to take them all to their country. And that they could not doubt but that on their return to their country, the *English* government would restore an equal number of prisoners of the same rank to *France*. An instrument was also drawn up between *Soult* and the other parties thereto, which set forth that the *English* captains, prisoners of war, and whose ships and cargoes were at that moment in the river *Douro*, confiscated by the laws of war, having been informed that the intention of his Grace the Duke of *Dalmatia*, governor-general of *Portugal*, was to render the commerce of *Portugal* as free, and on the same footing, as it had been before his entry with the *French* army, had offered to his Grace the Duke to re-purchase their ships and cargoes on the following terms: All the ships, on an average, 3000 dollars each; the pipe of wine at 106 dollars; and the quintal of corn at two dollars and a half; and the bale of cotton at 60 dollars; with the condition that his Grace would permit that Captain *Brooke*, of the *Little Mary*, might return himself to *England*, without delay, with his crew and passengers, for the purpose of negotiating with the company at *Lloyd's*, the owners of the ships and cargoes, or any other speculators, to remit, in *Spanish* dollars, the necessary funds for the payment for all *English* as well as other prizes that might answer their interest: and that the *English* captains who should remain in *Portugal* might continue in charge of their own respective vessels until an answer should be returned from *England*. And his Grace the Duke promised to the defendant, or to any one else concerned in this transaction, permission to return to *Oporto*, or any other port in *Portugal* in his possession, with cargoes of boots, shoes, provisions, and other stores, for their own benefit; and to trade with the army as well as with the inhabitants of *Portugal*. And the defendant and the rest of the passengers thereby obliged themselves to be responsible, that the

same

1810.

—  
WEBB  
v.  
BROOKE.

[ 7 ]



1810.

WEBB

v.

BROOKE.

[ 8 ]

same number of prisoners as themselves, with the crew, should be conveyed to *France* in exchange. Both these instruments were signed, as well by the plaintiff and defendant, as by several other *British* subjects. In order to carry into effect the arrangement contemplated by the two instruments above stated, the plaintiff lent to the defendant the sum of 3000 *Spanish* dollars, being 15,000 *francs*, for which the receipt hereinafter mentioned was given. The plaintiff accompanied the defendant to the *French* commissioners of prizes at *Oporto*, for the purpose of paying the price agreed on for the *Little Mary*, but were referred by that board to the *French* paymaster of the forces. Accordingly, the defendant, with the knowledge of the plaintiff, but without his attendance, proceeded to *De Carcel*, the *French* paymaster, and paid him the said sum of 3000 dollars, and took of him a receipt, whereby he, the undersigned paymaster provisional of the army of *Portugal*, acknowledged to have received of Mr. Brooke, an *English* captain, conformably to the letter of the president of the commission of prizes, the sum of fifteen thousand *francs* for the ransom which he had made of his ship named the *Little Mary*, taken in the river of *Douro*, whereof that should be his acquittance. (Signed) *De Carcel*. The *Little Mary* was in consequence liberated, and sailed, under the command of the defendant, with the plaintiff on board, to whom the defendant, on the homeward passage, gave, as security for the money he had lent, the bill upon which this action was brought; which bill was duly presented for acceptance, and refused; and due notice of the dishonor was given to the defendant. The defence set up was, that the money was lent for an illegal purpose, the ransom of the *Little Mary*. Upon these facts the jury found a verdict for the plaintiff; the Chief Justice reserving the point of law.

*Shepherd*, Serjt., in *Easter* term, having accordingly obtained a rule *nisi* to set aside the verdict and enter a nonsuit, on the authority of *Clugas v. Penahuma*, 4 *T. R.* 466, and *Sullivan v. Greaves*, 1 *Marsh. Insur.* 49.; though he admitted the latter case somewhat militated with *Tennant v. Elliot*, 1 *Bos. & Pull.* 3.

[ 9 ]

*Best*, *Vaughan*, and *Onslow*, Serjts. on a subsequent day in this term shewed cause. The supposed illegality of this contract must be proved either by some express legislative prohibition, or by the authority of decided cases, or by some known principle of law. The stat. 45 *Geo. 3. c. 72.* (which repeals the former statute relative to the same subject, 43 *Geo. 3. c. 160.*) re-enacts in the 16th section, that it shall not be lawful for any of his majesty's subjects to

to ransom, or to enter into any contract or agreement for ransoming, any ship or vessel belonging to any of his majesty's subjects, or any merchandise or goods on board the same, which shall be captured by the subjects of any state at war with his majesty, or by any person committing hostilities against his majesty's subjects, unless in the case of extreme necessity, to be allowed by the Court of Admiralty. And by the 17th section, all contracts and agreements which shall be entered into, and all bills, notes, and other securities, which shall be given by any person or persons for ransom of any ship or vessel, or of any merchandise or goods on board the same, contrary to that act, shall be absolutely null and void in law, and of no effect whatever. And by the eighteenth section, if any person shall, contrary to that act, ransom, or enter into any contract or agreement for ransoming, any such ship or vessel, or any merchandise or goods on board the same, every person so offending shall, for every such offence, forfeit the sum of 500*l*. They contended that although this statute renders the contract for the ransoming illegal, and all securities for it void, yet it does not avoid any except the principal contract, but accessory and auxiliary contracts may nevertheless be good, notwithstanding that act. It is quite clear that this bill of exchange was not the contract of ransom itself, nor is it an agreement for the ransom, which are the only contracts vacated by the statute. If the Court hold that it is, they must also hold that the plaintiff has subjected himself by this bill of exchange to the penalty of 500*l*. given by the 18th section, which would be monstrous. The statute 16 *Car. 2. c. 7. s. 3.* vacates all securities given, and all agreements for the payment of money exceeding 100*l*. won at play, but the Courts never held that contracts for the repayment of money lent for purposes of play were thereby rendered illegal; and even after another statute 9 *Ann. c. 14. s. 1.* had been enacted for the express purpose of declaring void all securities given for the repayment of money knowingly lent to game with, the Court, in *Barjeau v. Walmsley*, 2 *Str.* 1249. held, that it did not vacate the contract of lending at the time and place of play for the purpose of gaming. *Alcinbrook v. Hall*, 2 *Wils.* 309. (a). The plaintiff, upon request, paid for the defendant a sum exceeding 10*l*. which the latter had lost in a bet on a horse-race, and was allowed to recover it. 4 *Burr.* 2069. *Faikney v. Reynous and Richardson* (b). The plaintiff paid money

1810.  
—  
WEBB  
v.  
BROOKE.

[ 10 ]

(a) See *Clayton v. Dilly*, *Mich. term* 1811, *post.* vol. 4.

(b) *Burrow* entitles this case, *Faikney v. Reynous and Another*: but it appears in s *T. R.* 419. *note*, that upon examining the record, that other was found to be *Richardson*.

for

1810.

WEBB  
v.  
BROOKE.

[ 11 ]

for differences upon a stock-jobbing contract, contrary to the stat. 7 G. 2. c. 8. A moiety of the money was paid for the use of *Richardson*, who was partner in the contract, and the defendants had both given bond for the re-payment. Upon demurrer, Lord *Mansfield*, C. J. was clear that these facts being pleaded were no defence to an action on the bond, and the three other Judges concurred that it was a good bond. [*Lawrence*, J. observed that the distinction there taken between *malum in se* and *malum prohibitum* had been very often doubted.] *Petrie*, executor of *Keeble*, v. *Hannay*, 3 T. R. 418. The plaintiffs had paid a bill of exchange drawn by the testator, in favor of *Portis*, a stockbroker, on the defendant, and accepted by him, but dishonored when due; and they now declared for money paid for the defendant's use: the defence was, that as part of the sum claimed, the bill was given to reimburse *Portis* for so much money paid by him to divers persons for the differences of some stock-jobbing transactions, in which the testator, and the defendant, and another, had been partners, and had experienced a loss. The Court, with the exception of Lord *Kenyon*, C. J., held that the plaintiff was entitled to recover; and he had judgment accordingly. In this case the authority of *Faikney v. Reynous* was confirmed; and *Grose*, J. particularly observed, that the action was not founded on a promise arising by implication of law out of the illegal transaction, but on an express one made subsequent, and which the defendant was under no necessity of making (a). Here was an express subsequent promise. [*Mansfield*, C. J. Suppose the plaintiff, instead of lending the money to the defendant, had, with his own hand, paid it to *De Carcel*: would an express subsequent promise to repay avail him?] It would have made no difference: *Portis* paid the differences for *Keeble*, yet he recovered against *Keeble*. Suppose another had lent money to the plaintiff in order that he might lend it to the defendant for this ransom; would that contract have been void? Where is the illegality to stop? *Steers v. Lashley*, 6 T. R. 61., where it was held a good defence to a bill of exchange, accepted by the defendant, that it was originally created to pay the very differences on a stock-jobbing contract, is not a case adverse to the plaintiff; for there the drawer, who was *particeps criminis* with the defendant, could not transfer to his indorsee any more valid title to the contents of the bill than he himself had; especially as the indorsee had notice of the whole transaction: and Lord *Kenyon* there admitted the authority of *Faikney v. Reynous*, and *Petrie v. Hannay*. Here the plaintiff does that which Lord *Kenyon* there

(a) See *Barnes v. Hedley*, ante, 2 vol. 184.

expressly

expressly says might be done according to the authority of those cases. *Havelock v. Rockwood*, 8 T. R. 208. does not govern this case. There it was held that the plaintiff could not recover from the underwriters for the loss of a ship, which ship, though it had been captured, the plaintiff then had safe in his own possession, having re-purchased it under an illegal condemnation, which in effect was a ransom, an illegal payment, which the Court could not permit him to charge on the underwriter, as money paid for his use, when it was made without his consent, and the total loss was at an end by the re-possession of the ship (a). In *Waymell v. Reed*, 5 E. R. 599., the plaintiff was party to the original illegal smuggling transaction: it was not, like this, a distinct auxiliary contract. The plaintiff had nothing to do with the application of this money, though he knew of the purpose to which it was to be applied. [Heath, J. He personally went to the commissioners of prizes to see to the due application of it, for the purpose of ransom.] The Court cannot decide against the plaintiff's claim without going the full length of saying that no money lent can be recovered back, if the lender previously knew that it was to be applied to any prohibited purpose: which is contrary to *Alcinbrook v. Hall*, and to *Mitchel v. Cockburne*, 2 H. Bl. 379., where Eyre, C. J. expressly says that the cases of *Petrie v. Hannay*, and *Faikney v. Reynous*, were one step short of the illegal transaction. [Lawrence, J. Eyre, C. J. did not there say he meant to confirm those cases, but that *Mitchel v. Cockburne* did not come within the exception, even if they could be supported, which he evidently doubted, as did Lord Eldon, C. J. in *Aubert v. Maze*, 2 Bos. & Pull. 372.; and Lord Loughborough, Ch., in *Ex parte Mather*, 3 Ves. 373.; and Lord Kenyon, in *Steers v. Lashley*, only says, being pressed with those cases which he doubted, "if these circumstances were so and so, those cases might be applicable, but here they are not." Suppose you hire a horse, and tell the owner it is for the purpose of robbing on the highway, can he recover for the use of it? In 1 Bos. 340., *Lloyd v. Johnson*, it was held no answer to an action for washing a woman's clothes, that she was known to use them for frequenting public places for purposes of prostitution. But the act against ransoming was passed for purposes of public policy to induce our sailors to defend vessels to the last; but there is nothing immoral in ransoming: it is not like the case of a horse lent to rob on the highway.

*Shepherd*, who was prepared to support his rule, was stopped by the Court.

(a) See *Parsons v. Scott*, ante, vol. 2. p. 363.

MANSFIELD,

1810.

WEBB  
v.  
BROOKL.

[ 12 ]

[ 13 ]

1810.

WILSON

v.

BROOKS.

MANSFIELD, C. J. Certainly there is a manifest distinction between the cases of *Falkney v. Reynous*, and *Petrie v. Hannay*, and the other cases, in which a man having a debt of honour borrows money to pay it, and between those cases where the plaintiff previously advances the money for effectuating an illegal transaction, or causing it to be done. I did not before know that the first class of cases had been shaken: but they are very different from this case. For here I know not how to distinguish the plaintiff from the defendant: the persons being all in the same situation, are all equally to be benefited by this transaction; all equally solicitous to procure it; (for they were all to come home by the *Little Mary*;) and it is agreed that the plaintiff is to advance this money. The plaintiff and defendant go together to the French commissioners of prizes, who refer them to the paymaster; the defendant goes alone thither, and trusting to the honor of his owner, and hoping that the owner could recover it, as he attempted, against the underwriters, pays this money. How does this differ from a partnership in a smuggling transaction, where one advances more than his share of the money? And how can we distinguish the plaintiff and defendant? The plaintiff is as much the ransomer as the defendant, and the defendant as the plaintiff; and it would be singular, where two are equally interested in wishing and effecting a ransom, if, because it happens that one advances the money, and takes the bill of the other for the repayment, that shall be good; while if the bill were given to the captor only, it would be void; therefore, without at all going into the consideration of *Falkney v. Reynous*, and the other cases, it seems impossible to say that the ransom is not as much the deed of the plaintiff as of the defendant.

[ 14 ]

Rule absolute to enter a nonsuit.

June 26.

## LAWRENCE v. HEDGER.

Watchmen and beadle have authority at common law to arrest and detain in prison for examination, persons walking in the streets at night, whom there is reasonable ground to suspect of felony, although there is no proof of a felony having been committed.

**BEST**, Serjt. moved to set aside the verdict which *Mansfield*, C. J. had directed, upon the trial of this cause at *Guildhall*, at the sittings after last *Easter* term. It was an action of trespass and false imprisonment; and the case was, that the plaintiff passing through the streets of the City of *London*, in the ward of *Cripple-gate*, with a bundle in his hand, about the hour of ten o'clock at night, was stopped by a watchman, who took him to the watch-house, where the defendant, a beadle, was in attendance, who asked him what he had in his bundle, and who gave it him? He replied

replied to both questions, he did not know, but was carrying it to his sister in *St. George's Fields*; and referred him to a house there, at which he might inquire for proof of his veracity. The beadle did not send thither to inquire, but sent the plaintiff to the *Poultry Compter*, not charging the gaoler with the prisoner in the defendant's own name, but in the name of *Stevens*, who was the constable of the night, but who was not, as he ought to have been, in attendance at the watch-house, when the plaintiff was brought thither; and the plaintiff was, the next morning, carried before the sitting alderman, and discharged. Constables are chosen in the respective wards by the inhabitants, by custom, not under the authority of an act of parliament: a greater number is chosen in one ward than in another. In *Cripplegate* there are eight constables. In every ward there is a beadle, not chosen by the inhabitants, but appointed by the aldermen: the same person is usually chosen and sworn in constable also, as the defendant was. An act passed 10 *Geo. 3.* for regulating the police of *London*, gives a power to apprehend malefactors and suspected persons, and directs that a certain number of constables shall attend at the watch-house every night according to a rota therein referred to, which is not fixed by law, or appointed by the aldermen, but by the inhabitants. The act directs that watchmen apprehending persons shall carry them to the constable of the night, who shall carry them before a magistrate. This action was brought against the defendant for this detention and imprisonment; and it was contended that the power being given to the constable of the night only, the beadle had no authority to detain and imprison him. On the other hand, it was urged, that the defendant was sufficiently a constable for the performance of this duty; and *Mansfield, C. J.* was of opinion that, without the aid of this act, any watchman might detain the plaintiff, and carry him to a constable; and that it would be the constable's duty to secure him when so apprehended.

**HEATH, J.** It would be extremely mischievous if it were not so. At every *Old Bailey Sessions* numbers of persons are convicted in consequence of their being stopped by watchmen while they are carrying bundles in this way.

**LAWRENCE, J.** A woman walking up and down the streets to pick up men, a night-walker, may be apprehended: yet her's is a much less offence than is here suspected. In 2 *Burr.* 164. *Res v. Bootie*, is an indictment against a constable for suffering a street-walker, taken up by a watchman, to escape.

1810.

LAWRENCE  
v.  
HEDGER.

[ 15 ]

[ 16 ]

CHAMBER,

1810.

LAWRENCE

v.

HEDGER.

CHAMBRE, J. The case of *Samuel v. Payne*, Doug. 359. was an arrest even in the day-time, which was much stronger; but in the night, when the town is to be asleep, and it is the especial duty of these watchmen, and other officers, to guard against malefactors, it is highly necessary that they should have such a power of detention. And, in this case, what do you talk of groundless suspicion? There was abundant ground of suspicion here. We should be very sorry if the law were otherwise.

Rule refused.

June 26.

GAIRDNER and Another v. SENHOUSE.

Upon a policy from London to Trinidad or the Spanish Main, with leave to call at all or any of the West India Islands or settlements,

[ 17 ]

and with liberty to touch and stay at any ports or places whatsoever and wheresoever, the assured must take all the ports at which he touches, in the same succession in which they occur in the course of his voyage insured.

But if he is lost in steering for an island not in the outward course of his voyage to Trinidad, it is a question for the jury to consider, whether he had not abandoned the intention of going to Trinidad, and restricted himself to the residue of the voyage only.

If ports of call are named in a policy in a successive order, the ship must take them in the same succession in which they are named.

If they are not named in any order in the policy, they must be taken in the order in which they occur in the usual and most convenient and practicable course of the voyage, not according to the shortest geographical distances.

THIS was an action upon a policy of insurance on a voyage at and from London to Trinidad, and any port or ports of discharge in the Spanish Main, all or either, with leave to call at all or any of the West India islands or settlements, Jamaica and St. Domingo excepted. And the insurance was declared to be on goods on board the *Good Hope*, with liberty to touch and stay at any ports and places whatsoever, to seek, join, and exchange convoy, and to land, load, barter, and exchange goods, and take on board freight wheresoever she might call or touch at, without being deemed a deviation, and without prejudice to that insurance, at a premium of 10 guineas *per cent.*, to return 4 *per cent.* for convoy to the islands, and 1 *per cent.* for convoy from thence the remainder of the voyage, and arrives, or 2 *per cent.* if the voyage ends at Trinidad. Upon the trial of this cause at Guildhall, at the sittings after Hilary term 1810, before Mansfield, C. J. the defendant's subscription was admitted, and the plaintiff proved an adjustment, which was a surprise upon the defendants, who in consequence were obliged to call the plaintiff's witnesses to prove the case, which they relied on it that the plaintiff would be forced to prove, and upon whose testimony it appeared that the ship sailed from Gravesend, with her cargo, consisting of various articles, destined for a market, (which it was supposed the then expected capture of *Martinique* would afford,) under convoy of the *Naiad* frigate, until the 3d of April, when the vessels bound for Surinam, Berbice, and Demerara, and among them the *Good Hope*, by signal, parted company from the frigate, (which was bound for Barbadoes,) and proceeded under convoy of a sloop of war to De-

merara,

*merara*, and from thence, after two days, ran down in sight successively of *Tobago*, *St. Vincents*, and *St. Lucia*, and touched at *Martinique*, and, after four days' stay at the latter island, finding no market, shaped her course for the island of *St. Thomas*, passing by *St. Kitts*; and in the night of the following day struck on the *Anegada* reef, where the ship was lost, but the cargo was saved and brought in other vessels into *Tortola*, by which misfortune an average loss of 62 per cent. was incurred. The master had received, neither at home nor at any of the abovementioned ports where he called for instructions, any orders to proceed to *Trinidad* or the *Spanish Main*. The defence set up was that the vessel was guilty of a deviation; for that she was not entitled to touch at the islands and settlements in any other order of succession than the geographical order in which they lay in the map, computing the shortest distances from one to the other; and calling first at that which was nearest to *England*; or, otherwise, that the assured was bound to take them in the order in which they were named in the policy: but it was in evidence that it was extremely easy to run down in a few days before the wind from either of the settlements to the islands which lay more to the leeward, but that it was a course of great delay and difficulty, again to beat up against the wind from the leeward islands to the *Spanish Main*; and assuming that the vessel was still intended to go to the *Spanish Main* or *Trinidad*, or some other of the settlements or islands to windward, it would be a deviation to run down the wind to *Martinique* or *St. Thomas's* first, and then to beat up to windward afterwards, inasmuch as, although a liberty was given of touching and trading at all the islands, *St. Domingo* and *Jamaica* alone excepted, yet that liberty must be exercised by touching at those ports which the ship meant to touch at, in the same successive order in which the several places occurred in the usual and natural course of the voyage, without going backwards and forwards. It was in evidence, that it was not usual to go to *Trinidad* in order to go to the *Spanish Main*: that a vessel might have made *Trinidad* from the *Spanish Main* in two nights, but that in beating up from that island to *Demerara* on the *Spanish Main*, a month might possibly be consumed: that *Demerara* therefore was in the way to *Trinidad*, and also to *Martinique*; for an experienced seaman said, that if he were going to *Demerara* and *Martinique*, he should go to *Demerara* first: that *St. Domingo* and *Jamaica* would be out of the way to the *Spanish Main*. *Mansfield*, C. J. was of opinion that under these circumstances, and considering the extensive liberty given

1810.

GAIRDNER  
and ANOTHER  
v.  
SENHOUSE.

[ 18 ]

[ 19 ]



1810.  
 ———  
 GARDNER  
 and Another  
 v.  
 SENHOUSE.

by the policy, the plaintiff might take the islands and settlements in the order most convenient for himself, and was warranted in pursuing this course; and the special jury found a verdict for the plaintiff.

*Vaughan*, Serjt. in *Easter* term had obtained a rule nisi to set aside the verdict and have a new trial, upon the ground that as this policy did not contain the words "backwards and forwards," the ship taking a homeward direction, before she had reached her ultimate port of discharge, on her outward voyage, was a deviation according to the cases of *Lavabre v. Wilson*, 1 Doug. 284. and *Hogg v. Horner*, 1 Marshal on Insurances, 191. He observed that *St. Domingo* and *Jamaica*, the excepted islands, were in the direct course of the voyage from *England* to the *Spanish Main*, which greatly strengthened the inference that the liberty was to call at the islands only in the order in which they occurred in the course of the voyage.

*Shepherd* and *Best*, Serjts. in this term shewed cause. This vessel was travelling completely within the protection of the policy, which gave her liberty to go to all ports in the *Spanish Main*, and all islands except *St. Domingo* and *Jamaica*. The trade winds which prevail in those seas, effect, that a person who should first go to the northernmost island, and thence to the southward, would be as many months in performing the voyage, as he would be days if he first went to the southernmost point. *Demerara* was a port permitted by the policy, for though it is not a part of the *Spanish Main*, which lies only between *Vera Cruz* and the *Oronoko*, it is one of the settlements, (intending *British* settlements,) mentioned in the policy, of which there are but three, *Demerara*, *Berbice*, and *Surinam*. The terms of the policy are very large and peculiar: it points out no successive order in which the several ports are to be approached. [*Mansfield*, C. J. It seems to resemble the *East India* policies, which have the words backwards and forwards.] If the plaintiff had a right to go at all to *Demerara*, he had a right to take that and the islands in the same relative order in which all ships take them; and incontestably the best course a sailor can take, is, to go to the southernmost point of the voyage first, and then to run down to windward: and this is the course which occasions the least risk to the underwriters; but this policy in truth entitles the plaintiff to visit the several ports and islands in whatever order of succession he prefers.

*Cockell* and *Vaughan*, Serjts. in support of the rule. The plaintiff must exercise the liberty of calling at all these several ports and islands,

islands, by calling at them in the course of the voyage insured, which is from *London* to *Trinidad* and the *Spanish Main*. The defendant does not complain of the ship going to *Demerara*, but the deviation began from her leaving *Demerara*, whence she ran down to *Martinique* and *St. Thomas's*. If from *Demerara* she had run home, the underwriters would have had no cause to complain, because the sooner the outward voyage is determined, the better; but if she turned about at *Demerara*, without proceeding to the *Spanish Main*, she can afterwards call only at ports which lie in the homeward course of the prescribed voyage. It was in evidence, that for a ship leaving *Demerara* to go to *Martinique*, would be entirely out of her course from *Demerara* to the *Spanish Main*. Being at *Demerara*, she should have steered by *Tobago* for the *Spanish Main*. [Lawrence, J. What say you to the exception of *St. Domingo* and *Jamaica*? Could it be said that they are in the course of the voyage? Yet a ship easily runs down from either of those islands to the *Spanish Main*, which lies to leeward of them.] If the assured made his election to go to *Demerara*, he thereby abandoned those parts of the voyage which he had liberty to take in his course to *Demerara*; he might have taken *St. Thomas*, the *Virgin* islands, where the ship was lost, and *Martinique*, in their geographical order in going out, and it would have been no deviation, but he takes them after leaving *Demerara* in the homeward course, and then goes out to the *Spanish Main* again. Besides the cases of *Lavabre v. Wilson*, and *Hogg v. Horner*; it was held in 6 Term Rep. 531. *Beatson v. Howarth*, on a policy at and from *Fishermere* to *Gottenburgh*, and back to *Leith* and *Cockenzie*, that although *Cockenzie* was a bad harbour and *Leith* a secure one, and by discharging goods at *Leith*, the vessel would be lighter and less endangered in entering *Cockenzie*, yet as *Cockenzie* lay the nearest in the course of the voyage, it was a deviation to touch at *Leith* first, and thence go to *Cockenzie*. *Marsden v. Reid*, 5 East, 572. Policy at and from *Liverpool* to *Pulerno*, *Messina*, *Naples*, and *Leghorn*, provided the *French* should not be at *Leghorn*, the ship cleared out for *Naples* only, and it was urged there was no inception of the voyage insured; but as she was captured before she came to the dividing point, Lord *Ellenborough*, C. J. held that the risk was covered, but that if she had gone to more than one of the places named in the policy, she must have taken them in the order in which they were named. [Heath, J. There is something particular in this policy, which has not been noticed, that the assured might end where he pleased: he might have ended at *Trinidad*, if he had

1810.

GAIRDNER  
and Another  
v.  
SENHOUSE.

[ 21 ]

1810.  
 GAIRDNER  
 and Another  
 v.  
 SENHOUSE.  
 [ 22 ]

had pleased, or he might end at *St. Thomas's*; and it would have been a proper point to leave to the jury whether he had not abandoned the residue of the voyage, seeing whither he is bound, and having no orders for *Trinidad*, nor any cargo for *Trinidad*. *Lawrence, J.* The defendant's best argument is to contend the voyage was over, and that the ship was lost, not on her outward voyage, but on her homeward voyage, which was not insured by this policy.]

*Cur. adv. vult.*

On the following day the opinion of the Court was delivered by

*MANSFIELD, C. J.* The ship having got to *Demerara*, she seems to have given up all idea of going to the *Spanish Main*; for she is going to *Martinique*, and the captain had no instructions for *Trinidad*, either from *England* or *Demerara*; and the touching at *Martinique* seems, as far as I can judge, quite inconsistent with the prosecution of the voyage to *Trinidad* or the *Spanish Main*. The ship thence goes to *St. Thomas*, probably for a commercial purpose, but it is quite out of the voyage to *Trinidad*: and it seems also out of the voyage to the *Spanish Main*. At the trial the defendant was not so well prepared for trial as might be, for reasons of surprise which he has assigned: the assured contended at trial that he had a right to go to *St. Thomas's* first, and then to *Trinidad*, as within the liberty; and I directed the jury accordingly: so that it has never been left distinctly to the jury, whether the ship was in her voyage to *Trinidad* at the time of her loss; and though at the trial I was struck with the largeness of these words, as giving liberty to the ship to go any where she pleases, to any island, in any course, it must be confined to the voyage insured, that is, to some port in the course of the voyage to *Trinidad* and the *Spanish Main*; otherwise I do not see where the voyage is to end: they might make it last two years, by going to every *West India* island, except *St. Domingo* and *Jamaica*: and the larger the words are, the more necessary is this construction, else the ship might trade and barter without any termination; it is therefore very fit there should be a new trial in this cause, not waiting for another cause to be tried; and as it was not tried owing to my misunderstanding of the policy, it must be without costs. *Lavabre v. Wilson* is very strong, and the case of *Hogg v. Horner*, in *Marshal*, is prodigiously strong, for the number of ports in *Portugal* being very small, and the extent of the coast short, there is the less necessity

[ 23 ]

necessity for the restriction of taking it in the course of the voyage from *London to Portugal*: but for these reasons we think this liberty must be restricted to places to be taken in the course of the voyage from *London to Trinidad* and the *Spanish Main*, and that there must be a new trial.

1810.

GARDINER  
and Another  
v.  
SENHOUSE.

Rule absolute.

## MORRIS v. EDGINGTON.

[ 24 ]

June 27.

**T**HIS was an action brought by the tenant against his lessor upon the covenant in a lease for quiet enjoyment, and charging the defendant with having obstructed a way thereby demised. The defendant, by his lease, demised all that part of all those messuages or tenements and premises called the *Bear and Ragged Staff* in the north-east corner of *West Smithfield*, situate on the west side of the gateway or entrance to the premises; and also so much of the said messuage as extends over the gateway, and the room or apartment adjoining to the gateway on the east side thereof, then lately used as a kitchen to the said messuage, but then converted into a tap-room, and the cellar below the same; together with full ingress, egress, and regress out of and into the yard of the lessor, lying beyond the said gateway, at all seasonable times of the day, with horses and carts, for depositing porter, wine, and liquors in the cellars, and taking away the casks, [this was not the right of way which was charged to have been obstructed,] and all other ways and easements to the said demised premises belonging and appertaining. Except and reserved to *S. Toomer*, (the ground landlord,) and to the defendant, all other premises not thereby particularly demised, and also reserving the said gateway or entrance, and the yard, and the warehouse then lately erected over the same, occupied by *Palthorpe*, subject to the right of way and passage aforesaid, and all the buildings on the east and north sides thereof. The defendant pleaded, first, that he

No way, or other easement, can subsist in land of which there is an unity of possession.

But if a lessor, having used convenient ways over his own adjoining land during his own occupation, demises premises with all ways appurtenant, unless it be shewn in evidence that there was some way appurtenant *in alieno solo*, to satisfy the words of the grant, it shall be intended that he meant the ways used,

[ 25 ]

and they shall pass, though he miscall them appurtenant. *Per*

*Mansfield, C. J.*

An action on the covenant for quiet enjoy-

ment may be maintained for the disturbance of a way of necessity. *Per Mansfield, C. J.*

Whether a way of necessity shall be the way most convenient to the lessee? *Semb. acc. per Mansfield, C. J.*

A lease demised a messuage, consisting of two parts, separated by intervening reserved land, subjected only to a specific right of way for the lessee to a third building for a specific purpose, which reservation, strictly interpreted, would preclude him from all access to the one part, which was accessible only by crossing the reserved land, in one of two directions, the one by entering it from the residue of the demised premises; the other, and far the more convenient, by entering it from a public street; held that the lessee was entitled to a way across the reserved land from the public street to that part.

1810.  
 ———  
 MORRIS  
 v.  
 EDGINGTON

suffered to enjoy: secondly, that he did not obstruct. Upon the trial of this cause, at the sittings after *Hilary* term 1810, at *Guildhall*, before *Mansfield*, C. J., it appeared in evidence that the yard and warehouse reserved in the lease were used by common carriers, who unloaded their waggons and deposited valuable goods there: that the approach thereto was through the reserved gateway, and thence forward; and that the most obvious and usual approach to the tap-room from the public street was through the same gateway, upon entering which the door of the tap-room was seen on the eastern side of it, with a finger-board fixed up, which had been placed there while the lessor occupied the premises, pointing and directing "to the tap-room." That for the security of the carrier's goods deposited in the yard, the defendant caused the great gates of the gateway or entrance, which abut upon the public street, to be closed every night between six and seven o'clock, and refused after that time to open them for the admission of persons frequenting the tap-room. The plaintiff himself had formerly kept this public-house, and converted the kitchen to a tap-room, and while he kept it himself, and until, and at the time of making this demise, the access allowed for customers to the tap-room was the obvious and public one of entering from the public street through the gateway mentioned in the lease, which at that time was not accustomed to be closed till ten or eleven at night. It was proved that on the western side of the gateway was a coffee-room, having a door in front, opening to the public street, for persons frequenting it to enter; and communicating with the residue of the demised messuage by a door on the back part of the coffee-room, the coffee-room communicated with one end of a passage which ran behind it, and the other end whereof communicated with the reserved gateway; being the passage through which dinners were conveyed from the tap-room, while it was the kitchen, to the coffee-room, and through which liquors from the tap-room were still brought thither; so that when the great gates were closed, persons might enter the coffee-room from the street, go through it into this passage, and along this passage into the gateway, and crossing the gateway, would find themselves in the tap-room; but this approach to the tap-room being less public and obvious, invited fewer customers at night after the great gates were shut, and the plaintiff had in consequence experienced a loss in his trade. The defendant contended, that the exceptions in the lease pre-

[ 26 ]

cluded the plaintiff from using any right of way, except the right of way to the cellar through the gateway with liquors, which was expressly granted to him, and the right to enter the demised premises through the public door of the coffee-room, and from thence to go by a way of necessity from the western part of the messuage across the reserved gateway to the tap-room: for the plaintiff it was contended, that he was entitled to have access to the tap-room from the street through the gateway at all times, and the jury found a verdict for the plaintiff.

1810.

MORRIS

v.

EDGINGTON.

*Shepherd*, Serjt., in *Easter* term, moved for a rule *nisi* to set aside the verdict and have a new trial, upon the ground that it appeared by the evidence, that no such way was demised as the way which was proved to be obstructed. The lease, granting only one specific right of way up the gateway for certain specific purposes, and reserving the soil of the gateway itself, subject to the right so expressly granted, evidently disaffirmed the existence of any other right of way over that soil, than the way expressed, for *expressio unius est exclusio alterius*; and the tenant could not claim it as a way appurtenant, inasmuch as a lessor cannot have an easement appurtenant to be exercised in his own land, and consequently cannot demise any, *eo nomine*: but even if he could, this express definition of what ways shall be granted and pass thereby, over-rides and curtails the effect of the general words. He had a way to his tap-room through his other premises, therefore he was not entitled to this as a way of necessity. The Court granted a rule *nisi*.

[ 27 ]

*Lowe* and *Best*, Serjts., in this term shewed cause. They contended that every species of enjoyment of the premises which the lessor used before the lease, would pass by the words belonging and appertaining; they are equivalent to demise, *tam ample modo* as the lessor before held the premises. [*Heath and Chambre*, Js. Where that is intended, is it not usual to express it by the phrase "therewith used?"] The lessor left in the gateway a finger-board, directing "to the tap-room:" so that if he did not mean to pass this way, he was practising a fraud upon the plaintiff. *Archer v. Bennett*, 1 *Lev.* 131. Where one leased of two mills for grinding oatmeal, and part of a close, on which was a kiln for drying the oats, sold the mills, *cum pertinentiis*; *Wyndham*, J. held, that the kiln might pass as part of the mills. And by the grant of a messuage, conduits and water-pipes, laid in the vendor's land, will pass as parcel,

1810.

MORRIS  
v.

EDGINGTON.

[ 28 ]

although they are remote. *Nicholas v. Chamberlayne*, Cro. Jac. 121. acc. And that, though upon the sale of the house, the land be excepted, or upon sale of the land, the house be excepted; and the conduit and water-pipes pass with the house, because it is necessary and *quasi* appendant thereto. *Gennings v. Lake*, Cro. Car. 169. Land may be appertaining to a house, as well in the King's case as of a common person, where it hath been let and occupied for a convenient time. The reservation in the lease and the special grant prove nothing, for the broad door of the cellar, through which only the butts of liquor could be conveyed, was in the yard reserved, beyond the gateway, so that a special grant might be necessary to give him an extraordinary mode of access to that door; but it does not therefore follow, that the expression of that special and particular way over the soil of the gateway, excludes this, to which the plaintiff is entitled as one of the ordinary and necessary ways of approach belonging to the premises. [*Lawrence, J.* Does not the defendant's argument extend equally to preclude the access from the coffee-room and the residue of the messuage to the tap-room? Both approaches, being across the gateway, would be equally cut off. *Mansfield, C. J.* What is the meaning of the word necessary in this case? It is possible to get to the tap-room another way, through the coffee-room; but if it means necessary for the most convenient enjoyment of the tap-room, the one way is as necessary as the other. *Lawrence, J.* The way granted for liquors is a way through the reserved private yard, and the grant says nothing about a way through the gateway.] It is therefore unnecessary to labour the point, that this way is not excluded by the expression of the other way; and this way, inasmuch as it was before used by the lessor, passed to the plaintiff. This case is very distinguishable from *Clements v. Lambert*, ante, i. 205. A way is not like common: the one is a *profit appendre*, the other merely an easement. [*Lawrence, J.* In strictness of law, both are extinguished by unity of possession.]

[ 29 ]

*Shepherd* in support of his rule. There is no distinction between common and way in this respect; both must be claimed either by prescription or grant. The question upon these issues is, whether the defendant has interrupted the plaintiff in the exercise of any right which was demised to him, either as appurtenant, or as especially granted by this lease. If the words therewith used had been inserted here, ways extinguished by unity

unity of possession would have been thereby revived and would pass. *Clements v. Lambert* is directly in point: the words "belonging and appertaining" were there employed, which were insufficient, and it was held that if the deeds had contained the words "therewith used," it would have sufficed. This way was in like manner used and enjoyed at the time of the demise, as that common was, but it was not a way appurtenant or belonging, because it was over the land of the same owner. *Archer v. Bennett* does not apply, for the question was there made, whether the kiln could pass as appurtenant to the mill, and it was held it could not, for that land could not be appurtenant to land, though it might pass as parcel. It is not necessary to inquire, whether the opinion of *Wyndham, J.* was sound law, but it is not applicable here. *Bradshaw v. Eyre*, Cro. El. 570. and *Worledg v. Kingswell*, 2 Anderson, 168. S. C. Cro. El. 794. are according. [*Mansfield, C. J.* What right of way to the tap-room had the plaintiff, if he had not the way contended for?] It does not necessarily follow that any way was expressly demised; and if none was demised, the law would give the plaintiff a way of necessity; but he could not upon these issues recover for obstructing a way of necessity. Upon the face of this lease it certainly was intended to prevent the party's having the same access from *Smithfield* to the premises which had been formerly used: for there is an express demise of a way for horses out of and into the said yard, to convey liquor to and from the cellar, at all seasonable times of the day: but if the plaintiff's argument is right, all these words were superfluous, for he had all these privileges without any specific grant, inasmuch as the defendant, while he occupied the premises himself, used his cellar as well as his tap-room, and he has not more expressly reserved his yard than his gateway. [*Lawrence, J.* In order to get to the yard, and to use the right of way up the yard, the plaintiff must first go through the gateway: yet he grants no right of way up the gateway, not even to go with liquors to the cellar, but the right of way granted is over the yard only; and the other clause, which reserves the gateway, subject to the said right of way to the cellar, proves nothing by proving too much, for it equally destroys the right of way to the tap-room from the coffee-room.] It is not necessary to dispute that; the issue here is, whether we have obstructed a way demised by the lease, which the defendant has not done. If the defendant obstructs the plaintiff's way of necessity, he has another remedy by action

1810.

MORRIS  
v.  
EDGINGTON.

[ 30 ]

on



1810. on the case, it is not by an action on this covenant. And it does not follow, because the defendant is not at liberty to obstruct the path which goes across the gateway from the tap-room to the coffee-room, that he therefore may not obstruct the access from *Smithfield* to the tap-room. The defendant, therefore, is entitled to a new trial.

MORRIS  
v.  
EDGINGTON.

[ 31 ] MANSFIELD, C. J. The case certainly has admitted of some curious argument, and very well bottomed in the case of *Clements v. Lambert*; and no doubt a right of way, like a right of common, must be claimed as appurtenant; and if either hath been extinguished by unity of possession, it will no longer pass by the name of appurtenant: but there is a wide difference between a lease or a grant with easements over other foreign land, and a grant where the easements are in the lessor's land. All deeds are to be most strongly taken against the maker; and all deeds and writings are to be taken *secundum subjectam materiam*. Now what is the case here? There is no way that we hear of, at all, belonging to these premises, except the way over the land in question. Now, as we hear of no other ways, and as it is impossible that these parties, who are (a) supposed necessarily to understand the law, could suppose these ways were ways appurtenant: they therefore meant them, being the only subsisting ways, by the improper name of ways appurtenant. I say nothing of what is a way of necessity; I know not how it has been expounded, but it would not be a great stretch to call that a necessary way, without which the most convenient and reasonable mode of enjoying the premises could not be had. Then what are the circumstances of this case? First, it is much more convenient for any one to go to the tap-room through the gateway than through the coffee-room. And it is much more convenient to carry out beer through the gateway than through the coffee-room. Can it then be doubted that the intent was to give the same use of the way over the gateway, as the lessor before used to have? An argument has been built on the reservation of the gateway and yard, subject to the right of way with carriages and liquors to the cellar: but that is a particular sort of way, and has no connexion or reference at all with this way contended for, or the use of the tap-room. It is said, if this was

(a) *Sed vide* the doctrine of *Vaughan*, C. J. that it is not necessary the lessor and lessee should understand what are covenants in law, *Hayes v. Bickerstaffe*, *Vaug.* 126.; cited with approbation by the Master of the Rolls in *Fitzgerald v. Edmonberg*, *Fitz.* 219.

a necessary way, it could not pass by this deed; that I do not at all understand: if there be any right of way at all, it must pass under this lease, under which the plaintiff holds the premises. The argument founded on the expression of the special right of way goes too far; for if it deprives the plaintiff of this way, it deprives him of all ways to the tap-room. This does not at all break in upon or affect the authority of *Clements v. Lambert*, and the other cases, on which it is held that easements are extinguished by unity of possession.

1810.

MORRIS  
v.  
EDGINGTON.

LAWRENCE, J. Your argument derived from the express grant of the right of way to the cellar does not stand on good foundation: if that had not been granted especially, a general right of passage through the yard to and from the cellar for all purposes might have passed, not only to and from *West Smithfield*, but to and from other places; so that it was for the lessor's interest that a special grant was introduced as a restriction.

[ 32 ]

Rule discharged.

## HURST v. HOLDING.

June 27.

THIS was an action for money lent, and upon an account stated. Upon the trial of the cause at the *Guildhall* sittings after *Hilary* term 1810, before *Mansfield*, C. J., the proof was, that the defendant, who resided at *Liverpool*, having written to the plaintiff on the 7th of *February* to purchase him 33 bags of damaged *Surat* cottons at 23d. per lb., to be paid for in one month, with the usual *East India* Company's allowance; the plaintiff, on the ninth, bought cottons for less than the price named, to be paid for in one month; and at the time of the sale paid 87l. 12s. for custom-house duties, and 61l. more, as the allowance to the *East India* Company, and, on the 11th, sent the cottons to the *Axe* Inn in *Aldermanbury*, to be forwarded by the *Paddington* Canal to *Liverpool*, but with instructions to deliver them to the plaintiff's order. They were forwarded on the 18th from the *Axe*. *Whitley*, who had sold the cottons, afterwards hearing rumours disadvantageous to the credit of the defendant, applied to the plaintiff to stop the cottons, who, in consequence, on the 27th, gave directions at the *Axe* Inn that the cottons should not be delivered to the defendant otherwise than upon payment of the price. The person who received this order wrote to his agent in *Liverpool* accordingly on the same day, and the goods did not arrive in *Liverpool* till the 10th of *March*,

A broker purchases goods on commission at a month's credit, and pays duties on them, and sends them to the place of the purchaser's abode, consigned to his own order: The seller being fearful of the purchaser's credit, procures the broker to delay the arrival of the goods till the month's credit is expired, and to tender them to the buyer on pay-

[ 33 ]

ment of the price, whereupon they are refused. Held that the broker can neither recover the price, duties, or commission, in an action for money paid.

1810.  
 ———  
 HURST  
 v.  
 HOLDING.

*March*, when the month's credit was expired. The carriers at *Liverpool*, by the plaintiff's direction, upon the day after their arrival, tendered the cottons to the defendant, upon payment of the money, but he refused to accept them or pay for them: upon which the plaintiff, who had in the mean time on the 11th of *March* paid *Whitley* 407*l.* 12*s.* 4*d.* for the price of the cottons, by the same agent sold them on the 19th of *May* by auction at *Liverpool*, for the account of the defendant. It was in evidence, that the plaintiff was in the practice of buying cottons, as broker, for the defendant; and it was alleged that his usual course of dealing was to send them to the *Axe* in *Aldermanbury*, to be forwarded to *Liverpool* to be delivered to his own order. This action was brought to recover the price of the cottons, which the plaintiff had paid to *Whitley*; the duties he had paid at the custom-house; the allowances he had paid to the *East India Company*; and his own commission for purchasing them. *Mansfield, C. J.* thought he was not entitled to recover either; and the jury, under his direction, found a verdict for the defendant, with liberty to move to enter a verdict for the plaintiff for 87*l.* 12*s.* the amount of the duties paid at the custom-house, if the Court should be of opinion that he was entitled to recover that sum.

[ 34 ]

*Vaughan*, Serjt. in *Easter* term moved, as well upon the point reserved, as upon the ground that the plaintiff was entitled to recover the commission, which he had earned by making the purchase, at a time anterior to any misconduct in himself, and which he could not forfeit by what happened afterwards.

*Shepherd* and *Best*, Serjts., on this day, shewed cause against the rule on both grounds: the goods being bought at a month's credit, the purchaser is entitled to insist upon their being delivered in the ordinary course of trade; but contrary thereto, the goods are detained by the plaintiff's procurement until the month is expired, and are directed to be then delivered only upon payment of the price. The broker is not entitled to his commission unless he does his duty, which he violates by stopping the goods from coming to his employer's hands. If *Whitley*, of himself, without the aid of the plaintiff, had stopped the cottons, the plaintiff might have recovered; but, under the present circumstances, if he were agent for both parties, yet if he forwarded the interests of the one, by sacrificing those of the other, he is not entitled to recover commission against the latter. The same reason prevents his recovering the duty, for if he were entitled to recover it against the defendant, he would receive it twice

twice over; for he is already repaid the duties, inasmuch as he has sold the goods, increased in value by the amount of the duties paid, and has received the price, and therein the amount of the duties, from the last purchaser. Even if the defendant, and not the plaintiff, had prevented the bargain being completed, the plaintiff could not have recovered commission, which is not due till the completion of the contract; though he might have maintained an action against the defendant for preventing him, as broker, from completing a purchase upon which he would have been entitled to commission.

*Vaughan* in support of his rule. The plaintiff pays the sums of 87*l.* 12*s.* for the duties, and 61*l.* for allowances to the *East India Company* on the 10th of *February*, upon the taking the goods from the *India-house*, in the due discharge of his duty, in pursuance of the instructions given him on the 7th. He was bound to pay these sums; for he could not otherwise get the cottons out of the warehouse. He was on that day therefore entitled to be repaid these sums; it was a vested right. On the 11th he delivered the goods at the *Arc*, which was a delivery to the defendant, whence they are forwarded on the 18th; and although on the 27th the plaintiff gives directions at the *Arc* that the goods shall not be forwarded, yet they were then out of the power of the carriers there, and the order was inoperative. No action could be maintained against the plaintiff for misconduct; but if any could, yet that would not vacate his right to recover these debts already incurred; and as it is not the course of trade for brokers to charge interest on the sums they advance, his only compensation for these advances is in the shape of the commission, which is therefore due. It was not in proof that the goods were stopped in consequence of the imprudent order given on the 27th, and fraud is not to be inferred.

MANSFIELD, C. J. I do not know that the plaintiff is entitled even to the duties, though it may be a very hard case. For what is the case? The plaintiff buys cottons according to his instructions, and sends them, and by some accident they do not set out till the 18th. It is in evidence that they were stopped on the canal, the plaintiff says, by the seller; but if so, the seller could have known where to stop them only by communication with the plaintiff: when they arrive and are offered to the defendant he will not take them, the price had then fallen. The plaintiff writes on the 27th, the price of the goods not then being payable, to stop them, unless upon payment of the money. I have no note of any evidence that the plaintiff had previously sent

1810.

HURST

HOLDING.

[ 35 ]

[ 36 ]

1810.

MOUNT

v.

HOLDING.

sent to *Liverpool* other goods directed to his own order. On the 11th the plaintiff pays voluntarily for the goods, not in consequence of any direction from the defendant. So long after as the 19th of *May*, the plaintiff himself takes the goods and sells them. If he did it out of honor to save the defendant's credit, the utmost he could do would be, on paying *Whitley*, to be permitted to sue the defendant in *Whitley's* name for the price of the goods. Instead of that he pays the money, and endeavours, in a short way, to recover for money paid. Having himself taken possession of the goods, what right has he to charge the commission? As for the duties, he is paid them in the increased price of goods which he receives.

HEATH, J. The difficulties under which the plaintiff labours, he has brought on himself by deserting his duty as a broker.

LAWRENCE, J. It was admitted by the plaintiff's counsel, that if, through the misconduct of the plaintiff, the defendant does not get the goods, the defendant is not bound to pay for them. Now, as far as the evidence goes, it appears that the goods arrived on the 10th of *March*: that on the 11th the plaintiff took to the goods, and afterwards sold them. There is therefore every reason to believe that the non-delivery was occasioned by the act of the broker himself.

[ 37 ]

CHAMBRE, J. Certainly there was no delay in making the purchase; but the delivery at the *Axe* is not a delivery to the defendant; because the plaintiff sends them to be delivered to his own order, and before their arrival at *Liverpool* he sends orders that they shall not be delivered to the defendant till the time of credit is up: having then taken the goods, how can he possibly recover either for commission or for the money paid in his own wrong for the goods?

Rule discharged.

June 28.

## LYNCH and JONES v. HAMILTON.

An insurer is bound to communicate to the underwriters any intelligence he has, which may affect his choice whether he will insure at all, and at what premium he will insure.

Whether in fact true or false.

If a ship is advertised to be in danger, and the insurer effects a policy on ship or ships, knowing that the ship in danger is one of them, without stating the ships' names, this is a concealment which avoids the policy.

Although the rumour was false.

If an insurer effects a policy on ship or ships, knowing their names, but not communicating them, *semble* that the policy is void; such an insurance being tantamount to a representation that he does not know by what ships the goods will come.

broker,

broker, for himself and his partner the plaintiff *Lynch*. The first policy bore date on the 17th of *September*, and the second on the 26th of *November* 1808. The insurance in both was "at and from all or any of the *Canary* islands to *London*, with leave to carry simulated papers, and the King's licence, upon any kind of goods or merchandises on board the good ship or vessel, say ship or ships," valued, and declared to be "on goods as interest might appear, at ten guineas *per cent.*, to return three *per cent.* for licence or arrival." The plaintiffs declared the insurance to attach on goods laden on board the *Friendship*, *Anna Margaret*, and *President*. The declaration averred that the plaintiff was interested to the amount of all the money insured; and further stated that the *President* was captured on the 18th of *November*, and that an average loss was sustained upon the goods on board the *Friendship* by perils of the seas. The latter loss was paid into Court.

1810.  
—  
LYNCH  
v.  
HAMILTON.

Upon the trial of this cause at the *Guildhall* sittings after last *Hilary* term before *Mansfield*, C. J., it appeared that the plaintiff *Jones* had, in *August* 1808, effected a policy on goods by the *Anna Margaret*, by which ship he expected them to come; but in consequence of instructions from *Lynch*, who was then at *Teneriffe*, stating that the goods would be sent home in ship or ships, that policy was cancelled, and the policy of the 17th *September* was effected. *Lynch* shipped this adventure on board the *Friendship*, *President*, and *Anna Margaret*; and himself returned to *England* by the *Anna Margaret*, which sailed before the *President*. Finding, on his arrival, that the policies then effected fell short by 4000*l.* of the whole amount of his interest, he caused *Jones* to effect the policy of the 26th of *November*. The following paper was posted up in a conspicuous part of *Lloyd's* coffee-house on the 22d of *November*, and continued there till the time of effecting the policy. "The *Howard*, " *Marsh* master, arrived off *Dover*, from *Teneriffe*. Off the " *Salvages*, on the 27th day of *October*, being one day's sail " from *Lanceroitto*, she fell in with the *President*, *Owings* mas- " ter: she observed the *President* near on the larboard bow: " she appeared labouring much, and to be very leaky and deep " laden." *Jones* at that time knew the *President* to be a ship on board of which part of the goods insured was laden, and had the bills of lading in his possession. He did not communicate to the underwriter this circumstance, nor the letter, which was posted up, and which he had seen: but the letter was notorious,

[ 38 ]

1810.  
 ———  
 LYNCH  
 v.  
 HAMILTON.

[ 39 ]

notorious, and the defendant had equal opportunities with himself of seeing it. *Owings*, the captain, being called, proved, that on the 18th of *November* his ship the *President* was captured by a *French* privateer at the back of the *Isle of Wight*, being then perfectly in good time: that on the 27th of *October*, when he saw the *Howard, Marsh* master, the *President* was in good order, perfectly sea-worthy, and neither leaky nor deeply laden, and that he had no communication whatever with the *Howard. Shepherd, Serjt.*, for the defendant, contended that the plaintiff could not recover upon this second policy, for that he ought to have communicated to the underwriter both this paper and the fact that the *President* was covered by the policy; and urged that the concealment of either of these circumstances would avoid the contract. One of the jury raised the question whether a policy could legally be effected on ship or ships, without naming them, if they were then known to the insurer; to which his Lordship answered, that it had never yet been decided that a policy was void on that ground alone: but he left it to the jury whether the intelligence contained in the letter was not material to be communicated to the underwriter; and whether that communication had been made. The jury found a verdict for the defendant.

*Vaughan, Serjt.* in *Easter* term obtained a rule *nisi* to set aside this verdict and to enter a verdict for the plaintiff, or have a new trial. [*Mansfield, C. J.*, upon the motion for the rule, observed that there was no evidence or suspicion of actual fraud in this case: but the jury were of opinion that if a man knew by what ships his goods were coming, it was fraudulent to insure on ship or ships; and the reason is obvious, for if the *President* had arrived safe, and another ship had been lost, the plaintiff would have applied his policy on ship or ships to the vessel lost. *Lawrence, J.* thought it worthy of consideration whether, when a person insures on ship or ships, it is not equivalent to a representation that he does not know the ships, and if he does know them, whether it may be deemed to amount to a misrepresentation; for if the underwriter were not thus misled, he would inquire the state and condition of the ships.]

[ 40 ]

*Shepherd and Lens, Serjts.*, in shewing cause against the rule, observed that, although it had never yet been decided that an insurer, knowing the name of the ship by which his goods are coming, is bound to communicate it at the time of insuring, yet since the words of this policy indicate a studious concealment of the

the name of the ship when the plaintiff had the power to disclose it, that was in effect a misrepresentation, for it was equivalent to an assertion that the plaintiff did not know by what ship or ships the goods would come; and under these circumstances it might be right to say, that the plaintiff could not insure on ship or ships: but the jury did not proceed merely on the ground of this abstract notion which they had conceived of the law, but, after their attention was called by his Lordship to the particular application of the law to the present case, they decided on the ground that an insurer is bound to inform the underwriters of all that he knows which can be deemed material to the subject insured; and in this case the plaintiff possessed the intelligence that his ship was deep and leaky, yet he does not communicate it. The objection is not, in form, that he did not disclose that the *President* was deep and leaky, for the sources of that information were equally open to both parties, but that he, having seen the statement of the condition of the *President*, did not communicate to the underwriter that the *President* was one of the ships to be insured. If the insurance had been effected on the *President* by name, and the plaintiff had been informed that she was deep and leaky, it is quite clear that he ought not to have insured without disclosing that information; the not disclosing what ship the plaintiff meant to insure, is precisely the same thing in its consequences as if he had specifically insured the ship *President*, and had concealed what he knew of her condition: and it is immaterial whether the information be true or false. *Decosta v. Scandrett*, 2 P. Wms. 170., where one having a doubtful account that a ship described like his was taken, insured her without informing the underwriters, Lord *Macclesfield*, Chancellor, held, that he ought to have disclosed to them what intelligence he had of the ship's being in danger, and which might induce him, at least, to fear, that it was lost, though he had no certain account of it; for if this had been discovered, it is impossible to think that the insurers would have insured the ship at so small a premium as they had done, but either would not have insured at all, or would have insisted on a larger premium, so that the concealing of this intelligence was a fraud. Yet that intelligence was doubtful. 2 Str. 1183. *Seaman v. Fannereau*, at Guildhall: the plaintiff's agent received a letter to this effect: "On the 12th of this month I was in company with the ship *Davy*; at 12 in the night lost sight of her all at once: the captain spoke to me the day before, that he was leaky; and

1810.

LYNCH  
v.  
HAMILTON.

[ 41 ]



1810.  
 LYNCH  
 v.  
 HAMMERTON.

[ 42 ]

" and the next day we had a hard gale." This letter was not communicated to the underwriter; and although the ship continued her voyage till the 18th, and was then captured, *Lee C. J.* held, that the agent ought to have disclosed the letter, for either the defendant would not have underwritten, or would have insisted on a higher premium. And each party ought to know all the circumstances. In the case of *Willes v. Glover*, 1 *New Rep.* 14., the contents of a letter which stated the probable time of the ship's sailing, were withheld from the underwriters, and although that expectation was not correct, as the ship did not sail for a fortnight afterwards, yet the withholding the intelligence was deemed to vitiate the policy. In a late case of *Beckwaite v. Nalgrove*, tried at *Guildhall*, the plaintiff had concealed from the underwriters the fact that he had received a letter from the *Cape of Good Hope*, stating that there then were two or three *French* privateers in those seas; and upon the ground of that concealment he was nonsuited, and never moved for a new trial.

*Faughan and Pell, Serjts., contra.* There are two questions in this case: first, whether the plaintiff is absolutely bound to disclose the name of the ship if he happens to know it when he effects the policy; and secondly, whether he is bound to disclose every idle rumour that comes to his ear. The jury did not proceed on the ground that the communication of this letter was material; for when the plaintiff's counsel would have argued that in his reply, they stopped him; and they decided wholly on the ground that the plaintiff, who knew the names of the vessels, had insured on ship or ships without disclosing them. There is nothing in the terms of the second policy which indicates fraud, as it has been supposed; it only follows the phrase of the former policies, which were effected "on the good ship, say ship or ships," long before this letter was received. It was impossible that in this case the concealment of the names could be made an instrument of fraud, for all the former policies had been effected on ship or ships, and this was only an enlargement of the same risk, and on whatsoever ship the loss might have happened, all the underwriters on all the policies must have contributed to bear it. To insure the residue of the interest in the same terms after one ship was arrived, was rather a proof of good faith. The produce was not shipped on board the *President* only, nor does the policy apply to that ship alone, but equally to the *Anna Margaret* and *Friendship*, one of which arrived safe, and the other

other sustained only a trifling average loss. The case might be different if there were any pretence to say, that the concealment of the name of the ship was fraudulent; \* but that fact has not been found by the jury, nor was it even suggested at the trial. It is natural to suppose that, when an underwriter subscribes a policy on ship or ships, since the net is spread so wide as to include the risk upon every vessel wherein any of the goods can possibly be laden, he will require a higher premium than when it is confined to the mischances that may befall a single vessel: and since the increase of premium compensates him for the more extended risk, it is unnecessary to give him the advantages which reasonably enough attend an insurance effected at a lower premium. As to the second point, the underwriter may prudently abstain from communicating any rumours he may hear, for the very reason that has been assigned as obligatory on him to disclose them, because the disclosure would increase his premium. It may be admitted that, by the concealment, he takes the additional risk on himself; if the reports are true, the insurance is gone, but if they are false, the insurance stands unaffected. In two of the cases which have been cited, there were not mere rumours, but facts had actually happened which were never disclosed. It is to be collected from the case of *Decost v. Scandrett*, that the ship was really captured, as it was reported, and it being captured, the plaintiff, who had taken on him this risk, lost his insurance. In the case of *Seaman v. Ponnercau*, it may fairly be inferred that the ship was in the state described, from the language of the report, which adds, "the ship, however, continued her voyage till the 19th." This case, too, is very distinguishable from that of *Willes v. Glover*, for there the plaintiff accompanied his order to make the insurance with directions to conceal the expected time of sailing. In all the decided cases the intelligence to be communicated has been addressed to the plaintiff or his agent, and might and ought to have been disclosed by them. Here the letter was not addressed to the plaintiff or his agent; some enemy might have put it up for purposes injurious to the plaintiff; and at the trial it was proved that the rumour was unfounded. If every rumour is to be noticed, underwriters might obtain great advantages by themselves posting up notices that ships were in danger. Both instances of concealment, therefore, were perfectly innocent. { *Mansfield, C. J.* It certainly does not appear in what light the jury considered the concealment of the name of the ship: they may have considered it

1810.

LYNCH

v.

HAMILTON.

[ \* 43 ]

[ 44 ]

1810.  
 —  
 LYNCH  
 v.  
 HAMILTON.

it in two views: first, as a wilful and fraudulent concealment; secondly, as an instance of the bad consequences of insuring on ship or ships, when the ship's name was known.]

*Cwr. adv. vult.*

MANSFIELD, C. J. now delivered the opinion of the Court.

After having recapitulated the facts of the cases, he observed that, no doubt, upon established principles, a person insuring is bound to communicate every intelligence he has, that may affect the mind of the underwriter in either of these two ways: first, as to the point whether he will insure at all; and secondly, as to the point at what premium he will insure. Is this paper then a piece of intelligence of that description? It states that the *President* had been seen near the beginning of her voyage, deeply laden and leaky. In this case, the insurance being made on ship or ships, this paper would convey to all those who knew that the goods were on board the *President*, the intelligence, that the vessel which was bringing the goods was deeply laden and leaky, but it could not convey that idea to those who knew not where the goods were: this paper, therefore, could not convey to the underwriters any knowledge that the ship insured was deeply laden and leaky; but it did to *Jones*, for he knew on board what ship the goods were laden. This made the difference in the state of their information; and the withholding of the ship's names, kept the underwriters completely in the dark, as to any notice that the ship insured was deep and leaky. The question therefore is, whether the plaintiff, effecting an insurance under this disparity of condition, is entitled to recover. I cannot distinguish this from the case of *Seaman v. Fonnereau*, where a letter received, stated that the vessel insured had been seen in the night leaky, and had disappeared the next day; and though that rumour was false, inasmuch as the ship kept her course, and was afterwards captured, it was held that, for want of that disclosure, the underwriters were not liable. We do not now decide on the point, that a party cannot insure on ship or ships when he knows on board what ship his goods are laden, although the jury thought that was a proper ground for a nonsuit, but we decide on the ground of the adjudged cases, applied to the circumstances of the present action, namely, that the plaintiff did not communicate this rumour, so prejudicial to the safety of the vessel, when he himself knew it, at the same time understanding, as we do, that the rumour was groundless.

Rule discharged.

HILL

1810.

## HILL v. TOWNSEND.

June 26.

**S***SHEPHERD*, Serjt. moved for a rule that the plaintiff in this action, which, upon the trial at *Coventry*, had been referred by an order of *nisi prius*, might enter up judgment pursuant to the award, upon an affidavit that the arbitrator had made such an award, and had sent it the plaintiff's attorney, who was now dead, and that the award was not to be found among his papers or elsewhere. The original draft of the award was annexed to the affidavit.

If an award is lost, the Court will, nevertheless, permit judgment to be entered accordingly, upon affidavit of its contents.

[ 46 ]

The Court granted a rule *nisi*; and no cause being shewn, it was afterwards made

Absolute:

## CLARKE v. HOPPE and WONTNER, Bail of WILSON.

June 28.

**B***BEST*, Serjt. had on a former day obtained a rule *nisi* for setting aside the proceedings in this action against the bail, under the following circumstances. The defendants became bail for *Wilson* in the original action, in *Michaelmas* term 1808; a commission of bankrupt issued against *Wilson* on the 26th of *November* 1808: the bankrupt obtained his certificate on the 20th of *January* 1809, not having then pleaded. The plaintiff had applied to the commissioners to be permitted to prove his debt under the commission, but they would not allow him: however, they allowed him to enter his claim under the commission, and recommended to him to proceed in his action. In *June* 1809, the plaintiff signed an interlocutory judgment for want of a plea, and had since executed a writ of inquiry, signed final judgment, sued out writs of execution, and proceeded regularly against the bail.

If an action be commenced, and the defendant become bankrupt and obtain his certificate, and afterwards permit judgment to be signed for want of a plea, after which the plaintiff proceed against the bail, the Court will not relieve the bail on motion.

And *semble*, that they could in no mode take advantage of the bankruptcy and certificate.

*Vaughan*, Serjt. on a former day in this term shewed cause. *Wilson* might have availed himself, in the original action, of his bankruptcy and certificate by pleading it; but having neglected so to do, and having permitted all the costs of the subsequent proceedings to be incurred, he has lost his opportunity, and the bail cannot be in a better condition than their principal. If the bail could at this moment surrender their principal, he would not be entitled to his discharge, for his relief is only under the act of 5 *Geo.* 2. c. 30. s. 13. which enacts that, "if any

[ 47 ]

1810. " bankrupt, who shall have obtained his certificate, and such  
 CLARKE " certificate shall have been allowed and confirmed as by that  
 v. " act is directed, shall be taken in execution, or detained in  
 HOPPE. " prison, on account of any debt owing before he became a  
 " bankrupt, by reason that judgment was obtained before such  
 " certificate was allowed and confirmed," the Court may order  
 him to be discharged: but if the principal in this case were sur-  
 rendered, he would not be taken or detained, " by reason that  
 " judgment was obtained before his certificate was allowed," for  
 he had his certificate long before judgment, and before plea  
 pleaded, and might have pleaded it; and these circumstances  
 arising long before the late statute 49 Geo. 3. c. 121. was passed,  
 it is unnecessary to consider whether the case could be affected  
 by any of the enactments therein contained.

*Best* in support of his rule. The bail are entitled to relief in  
 this case. The objection to this is a surprise; for it was con-  
 sidered as of course that the bail would be discharged. *Beddome v.*  
*Holbrook*, 1 Bos. & Pull. 450. n. Where, in *scire facias* against  
 the bail, they pleaded generally that their principal, after judg-  
 ment recovered, and before the *scire facias* issued, became a  
 bankrupt and obtained his certificate, which was allowed before  
 the return of the *scire facias*; though the Court, on demurrer,  
 held that the general plea was given only to the bankrupt him-  
 self, and even doubted whether the bail could in any way plead  
 the bankruptcy and certificate; yet *Buller, J.* said, that might  
 afford ground for the Court to relieve on motion. 1 Bos. & Pull.  
 150., *Donnelly v. Dunn.* But as the bail here were not fixed  
 before the certificate obtained, they cannot be fixed after it.  
 The bail in the present case had no notice that the action was  
 proceeding; neither ought they to be precluded of their relief  
 by the laches of the defendant, who might have pleaded his  
 certificate.

{ 48 }

MANSFIELD, C. J. In every case the bail put themselves in  
 the hazard of suffering by the folly and negligence of the defend-  
 ant; and although the common rule is that if the bail is not  
 fixed before certificate obtained, they are discharged: yet here  
 there has been a neglect to plead the certificate.

HEATH, J. It is the business of the bail to watch the pro-  
 ceedings.

LAWRENCE, J. If the bail will search the files of the Court  
 they will find a writ of *capias ad satisfaciendum* returned *nil*,  
 which is notice to them that the plaintiff intends to proceed  
 against

against them. And are not the bail in all cases bound and benefited by the defence of their principal? Is it not their business to watch him?

The Court directed that the case should stand over, in order that the parties might search for precedents in similar cases.

On this day the matter was again moved. The counsel produced no precedents: but *Best* said it was an application to the equitable jurisdiction of the Court.

MANSFIELD, C. J. We will let in the bail to try the right in the original action, in an issue; the defendants undertaking not to set up the bankruptcy and certificate as a bar; and the bail-piece in the mean time to stand as a security; the consideration of costs to be reserved till after the trial of the issue; and the rule in the mean time to stand enlarged.

LAWRENCE, J. said that he had made inquiries of Master *Foster*, and that the case had not been known to occur in the Court of *King's Bench*: that in the issue the bail were to be defendants, and the plaintiff here was to be plaintiff in the issue, and was to aver that so much money was due and owing; and the bankrupt was not to be examined as a witness.

CHAMBRE, J. This is a very nice question, and it is the first time it ever came before the Court: we cannot therefore give costs now. They must stand over for further consideration.

Rule enlarged.

1810.

CLARKE  
v.  
HOPPE.

[ 49 ]

NOKES, Plaintiff; STYLES, Widow, Deforceant.

June 29.

LENS, Serjt. moved that the acknowledgment of a fine might be amended by striking out the place mentioned in the caption. It was expressed to be, and was in fact taken and acknowledged at the house of *J. Perrott*, commonly known by the name of *Perrott's Hotel*, in *Brook-street*, in the parish of *St. George, Hanover-square*, in the county of *Middlesex*, on the 7th of *June* 1810, before two ordinary commissioners therein named: the premises were in the county of *Salop*. The conusor was of the age of 88 years, and had since returned into the county of *Salop*, and there was some apprehension, from the state of her health, and her advanced period of life, that it might not be practicable to procure another acknowledgment by her in that county. It was pointed out by the judge's clerk as an irregularity, that the conusor being in *Westminster*, it was necessary that she should personally appear before a judge to

All fines acknowledged in *Westminster* must be acknowledged before a judge or a serjeant, if there is a judge in town.

And if it be acknowledged before any other commissioners, it is irregular, whether it appear by the caption that it was acknowledged in *Westminster*, Or not.

[ 50 ]

1810.

NOKES

v.

STYLES.

acknowledge it. *Lens* contended that if the defect ceased to appear on the caption, there would be no objection to the fine; for the state of the conusor's health was such, that if she were still in *Westminster* she could not appear before a judge, either in court or at chambers; and moreover, the rule of Court requiring personal appearance generally was understood by practitioners to relate only to fines levied in term time, not in the vacation: and upon inquiry among practitioners, it appeared that, in point of fact, it was usual to take the acknowledgments of fines by *dedimus* as well in *Westminster* as in the country: and as well when there are judges in town as when there are none. The clause *quia ægrotat* was in use as well in the case of the conusor residing in *Westminster*, but not being well enough to come down to *Westminster-hall*, as of one residing at a distance.

The Court adjourned the decision of the point to this day, when they were clear that the amendment could not be permitted; and that if it were, the fine would still continue irregular. As to the supposed practice, if an acknowledgment is taken before the chief justice, no *dedimus* is necessary; if the acknowledgment is taken before a puisne judge, or a serjeant, a *dedimus* directed to them is necessary: but the difference is, that while a judge is in town no *dedimus* can be directed to any other commissioners; and that if the acknowledgment be taken before a judge or a serjeant, a *dedimus* to authorize it may issue afterwards; but in the case of all other commissioners the *dedimus* must issue before the acknowledgment taken. The fine was irregularly taken in the first instance, being in direct contradiction to a standing rule of the Court, and the parties sought to cure it by requesting the Court to sanction a fraud on their own rule.

[ 51 ]

*Lens* took nothing by his motion.

---



---

[IN THE EXCHEQUER-CHAMBER.]

June 29.

SAXELBY v. MOOR.

Upon a writ  
of error being  
non-prossed, if  
the cause of

*TINDAL* moved that the clerk of the errors might compute the interest on the sum recovered by the judgment affirmed action in the court below was not a debt which carried interest, the Court of error will not allow interest on the sum recovered by the judgment, unless it is distinctly proved, or admitted, that the writ of error was brought for delay.

Although there are strong circumstances from which it may be inferred that it was brought for delay only.

in

in this case: the action in the court below was for goods sold and delivered, but his affidavit stated a letter, written by the plaintiff in error, soon after the trial, in which he admitted that "he conceived that the accounts between the plaintiff and defendant were finally closed by the verdict of the jury;" whence the Court could infer that the writ of error was brought only for delay. *Miller v. Cousins*, 2 Bos. & Pull. 329. The Court seeing it was in effect, though not expressly admitted by the attorney for the plaintiff in error, that delay was the object of the writ, refused to stay execution pending a writ of error brought; and the practice of the King's Bench is the same. *Law v. Smith*, 4 T. R. 436. n. And wherever the Courts below would refuse to stay executions, this Court, on affirmance, will give interest.

MANSFIELD, C. J. Certainly the law is rather in an odd state in this respect. The Courts will not stay an execution where there is positive evidence of the purpose of delay: but where there is no evidence of it, though every one knows the writ is sued out for delay, it is a stay of execution. The interest in this Court must probably follow the rule of execution in the Courts below; but the facts stated by the defendant in error are not sufficiently strong to prove that the writ is brought for delay only. It is true that the verdict of a jury settles the account; but it does not therefore necessarily follow that the error is not brought for good cause.

Rule refused.

1810.

SAXELEY  
v.  
MOOR.

[ 52 ]

### ELLIS v. HAMLEN.

June 29.

THIS was an action brought by a builder against his employer, upon a special contract for building a house of materials and dimensions specified in the contract, to recover the balance of the sum therein agreed on; the principal part of the price having been paid. Upon the trial of this cause this day at the sittings at *Guildhall*, before *Mansfield*, C. J. the defence was, and the evidence supported it, that the plaintiff had omitted to put into the building certain joists and other materials of the given description and measure. The counsel for the plaintiff proceeded to inquire of the witnesses what additional sum must be expended on the house to make it equal in value to that which was specified in the contract, contending that the plaintiff was entitled to recover in this action the whole sum which was specified in the contract, excepting thereout the amount

If a builder undertakes a work of specified dimensions and materials, and deviates from the specification, he cannot recover upon a *quantum valebant*, for the work, labour and materials.



1810.  
 ———  
 ELLIS  
 v.  
 HAMLEN.  
 [ 53 ]

amount of this difference in value, which, they said, would be the measure of damages, if an action had been brought on the contract by the employer against the builder for not performing his contract; and that if the sums which had already been paid to the plaintiff on account did not amount to the whole price specified in the contract, deducting therefrom the amount of the before-mentioned difference in value, the plaintiff was entitled to a verdict for the residue, *minus* that difference.

MANSFIELD, C. J. was of opinion that the plaintiff, not having performed the agreement he had proved, must be nonsuited.

The plaintiff's counsel then resorted to a count which they found in the declaration, for work, labour, and materials, upon a *quantum valebant*, and said, that the plaintiff having the benefit of the houses, was bound at least to pay for them according to their value. *Mansfield*, C. J. Suppose you had come hither upon a *quantum valebant* only, could you have recovered on it? Certainly not. The defendant would have said, "I made no such agreement: I agreed to pay you if you would build my house in a certain manner, which you have not done." Here the plaintiff has properly declared on his special contract, and he has shewn and proved that he made such a contract, and has received much money on it. He cannot now be permitted to turn round and say, I will be paid by a measure-and-value price. The defendant agrees to have a building of such and such dimensions: is he to have his ground covered with buildings of no use, which he would be glad to see removed, and is he to be forced to pay for them besides? It is said he has the benefit of the houses, and therefore the plaintiff is entitled to recover on a *quantum valebant*. To be sure it is hard that he should build houses and not be paid for them; but the difficulty is to know where to draw the line; for if the defendant is obliged to pay in a case where there is one deviation from his contract, he may equally be obliged to pay for any thing, how far soever distant from what the contract stipulated for. The plaintiff accordingly was nonsuited; and the case was never again moved.

[ 54 ]  
 June 30.

A notice desiring the defendant to "quit the premises which you hold under me, your term therein having long since expired," does not recognize a subsisting tenancy from year to year subsequent to the term, but is a mere demand of possession.

DOE, on the Demise of GODSELL, v. INGLIS.

**T**HIS ejectment, brought to recover the possession of a messuage in *West Cowes*, upon three demises, the first of which

was

was laid on the 27th of *December* 1805, and the second on the 31st *August* 1809, was tried at the *Winchester Lent* assizes 1810, before *Chambre, J.*, when a verdict was found for the plaintiff, subject to a case in substance as follows: *Godsell* being seised in fee of the premises, on the 8th day of *January* 1809, by indenture demised them to the defendant for seven years from the 21st of *December* then last past, at the yearly rent of 26*l.* 5*s.*, and died seised in *March* 1802, having first, by will duly executed to pass real estates, devised them to his son *John Godsell*, (the lessor of the plaintiff,) in fee: also the rents and profits arising therefrom, to be received by his executors until his son should be of age, and to be applied by them for his son's maintenance and advancement in life, as to his executors should seem meet; and the residue, if any should remain in their hands at the time of his arriving at the age of 21 years, to be paid to him for his own use and benefit: and he appointed the defendant and three others his executors. The defendant had continued in possession of the premises from the commencement of the term of seven years hitherto. The defendant, after the death of the lessor, paid the rent reserved by the lease to one of his co-executors *Thomas Godsell*, during the continuance of the lease; and from the expiration of the lease to the 21st of *December* 1808, likewise paid him rent after the same rate. The lessor of the plaintiff attained the age of 21 on the 19th of *August* 1809; and on the 2d day of *November* in the same year gave to the defendant "notice to quit the house, storehouse, and quay he held under the lessor of the plaintiff, situate at *West Cowes*, in the *Isle of Wight*, the defendant's term therein having some time since expired." No other notice to quit had been given. The question for the opinion of the Court was, whether the lessor of the plaintiff were entitled to recover.

*Lens, Serjt.*, for the lessor of the plaintiff, was stopped by the Court; who called on

*Shepherd, Serjt.* He contended that by the notice which had been given, the lessor of the plaintiff, by using the expression "the premises which you hold under me," distinctly recognized a tenancy of the defendant, as holding under the lessor of the plaintiff after the time when the old lease had expired in 1805, and after the time when the interest of the executors had expired. It was in proof that the tenancy first originated from 21st *December*; and therefore every subsequent year after the expiration of the lease must be computed from 21st *December*. A notice therefore

1810.

—  
Doe,  
Lessee of  
GODSELL,  
v.  
INGLIS.

[ 55 ]

1810.

DOE,  
Lessee of  
GODSELL,  
v.  
INGLIS.

therefore given on 2d *November*, must be understood as a notice requiring the defendant to quit on 21st *December* then next ensuing, which was too short a notice for quitting on that day, and unreasonable; and it could not be understood as a notice requiring him to quit at the end of the ensuing year. It was therefore bad as a notice, but good as a demise, or rather as the recognition of a subsisting tenancy, which could not be determined without notice, and no subsequent notice had been given.

MANSFIELD, C. J. You do not shew that the holding subsequent to the expiration of the lease was with the assent of the lessor of the plaintiff. There is nothing at all in the case. This writing is not in the least like a notice to quit, but it is a mere demand of possession, the defendant's term having then some time since expired. The lessor of the plaintiff need not have given any notice at all; but the circumstance of his having given a notice, will not hurt him. The plaintiff is entitled to judgment on the second demise.

[ 56 ]

June 30.

WATERS v. Sir WM. MANSELL, Bart.

To entitle the grantee of an annuity to recover back the price, as money had and received, it is sufficient if the grantor has communicated to the grantee that there are defects in the memorial, and has treated for a compromise on the ground of the annuity being void, although the grantee neither demands payment of the arrears, nor tenders new securities, nor delivers up the old ones, before he sues.

And although the grantor has taken no active measures to set aside the securities.

THIS was an action for money had and received, brought to recover back the price which the plaintiff had paid for a life annuity, it having been discovered, that on account of an informality in the memorial, which omitted to state as part of the consideration, that the life of the *cestui que vie* was to be insured at the expense of the grantor, the securities were void. The defendant pleaded the general issue, and the statute of limitations. Upon the trial of this cause at the sittings at *Westminster* in this term, before *Mansfield*, C. J., it appeared that when six half-yearly payments of the annuity had been made, the defendant, becoming embarrassed in his circumstances, went abroad, and after that time he never made any further payments of the annuity. In his absence, his mother, Lady *Mansell*, within six years before the commencement of this action, by the agency of her solicitor, sent a circular letter to all her son's annuity creditors, and amongst others to the plaintiff, apprizing them that she was informed that all the annuities could be set aside for want of form, but that she was willing to compromise with all of them, if all would accede to the mea-

sure,

sure, and to repay them their principal and interest, they giving credit for the several annuity payments which they had received; but, that unless all accepted the proposal, it would not be granted to a part of them only, and they would receive nothing. When the defendant returned to *England* he assented to what Lady *Mansell* had done; but all the annuitants not acceding to the terms proposed, the negotiation dropped. Lady *Mansell's* solicitor being examined, stated, that he never knew of the specific defects in this annuity: the plaintiff's solicitor, on the other hand, gave evidence that he did know of the specific defects, and believed that the other witness knew them. *Lens*, Serjt., for the plaintiff, relied on this evidence as proving that, within six years past, the defendant had acknowledged the debt, by admitting the annuity deeds to be void. *Best*, Serjt. and *Casberd*, for the defendant, objected, that the money was originally paid as the consideration for the purchase of an annuity, and nothing was proved by which it appeared that the annuity did not still subsist: for although it was alleged that there was some defect in the memorial, the specific defect was not stated to the plaintiff, and nothing was in fact done in consequence of the objection. If the defendant had applied to this Court, and had procured the annuity to be set aside for these defects, the plaintiff might well have recovered the price; but Lord *Kenyon*, C. J. held, that it was necessary the grantor should dissent to the annuity, and that unless the annuitant has communicated the defect to the grantor, and requested new securities, and until the grantor has refused to execute them, the annuity must be deemed to subsist; or at least it does not lie in the mouth of the annuitant, by whose own laches it happens that the securities are imperfect, to say, that it is at an end *Weddell v. Ryneham*, 1 *Esp. N. P. Rep.* 309. *Hicks v. Hicks*, 3 *East*, 16. Where the Court held the defendant entitled to set off all the annuity-payments that had been made before the annuity was set aside, it expressly appeared that new securities had been tendered by the grantee to the grantor for execution, and that the latter had refused to execute them. At least the plaintiff ought to have given up the annuity deeds to be cancelled; for before he could sustain this action, he was bound to put himself into such a situation, that he could never again turn upon the defendant, and, by insisting on the annuity, render it necessary for him to move to set aside the securities.

MANSFIELD,

1810.

WATERS  
v.  
MANSELL.

[ 57 ]

[ 58 ]

1810.

WATERS  
v.  
MANSELL.

MANSFIELD, C. J. Lord *Kenyon's* opinion is clearly law so far as this, that the plaintiff cannot, by his own negligence, alter the contract from a contract of annuity to a contract of money had and received: but after this negotiation, and it being understood between the two solicitors that the securities are void, the question is, whether, upon the compromise not going on, it was necessary for the plaintiff to demand payment of the arrears of the annuity, or to tender new deeds before he could bring this action: he was not bound to send back the old deeds, for they are part of his evidence to make out his case when he comes to bring his action for money had and received. The evidence being contradictory as to the solicitor's knowledge of the defects, his Lordship left it to the jury to find, whether the defendant had dissented from the annuity or not, and, considering this as a new point, directed the jury, if they should be of opinion that the defendant had dissented, they should find a verdict for the plaintiff; and gave liberty to the defendant to move to enter a nonsuit, if the Court should be of opinion that it was necessary to this action that any thing more should take place between the parties, than that both of them should understand that the securities were void. The jury accordingly found a verdict for the plaintiff for the damages in the declaration, subject to an account to be taken by an arbitrator, and subject to the point reserved.

[ 59 ]

*Best* on this day moved to enter a nonsuit, upon the same grounds which he had taken at the trial, and particularly insisted on the point, that the plaintiff ought to have given up the deeds; for that by lying by, he might, in many cases, change the defendant's situation, whose witnesses might die, so that if the plaintiff should again choose to set up the annuity, the defendant might be unable to disprove it.

The Court were unanimous in refusing the application; it was a strange argument: the defendant first pays six half-yearly payments, then becomes embarrassed, and ceases to pay; he then treats for the redemption of the annuity, and on that treaty both parties agree that the annuity is void, and no payment thereof is ever afterwards made.

RAWLINGS,

1810.

June 30.

RAWLINGS, Demandant; PRICE, Tenant; JOHN TOM and MARY his Wife, and WILLIAM TOM and MARY his Wife, first Vouchees; JOHN TOM the Younger, second Vouchee.

THIS recovery was intended to have been of *Easter* term last past, and with treble voucher, the vouchees appearing by attorney, and the tenant appearing in person. By a mistake, however, only one *dedimus* was obtained, and sent into the country; but the acknowledgments of both the first and second vouchees were taken, the latter of which was therefore irregular; and after the writ of entry had issued, and the tenant had appeared at bar, the cursitor, discovering the mistake, refused to make out the *mittimus* and transcript, upon the ground that there ought to have been a second *dedimus* for the second vouchee. It being of little importance whether the second vouchee were or were not vouched, in order to avoid the expense of suffering another recovery *de novo*, *Lens*, Serjt. moved to amend the writs of *dedimus* and entry, and the warrant of attorney, duplicate and *præcipe* at bar, by striking out the name and the warrant of attorney of *John Tom* the younger, and every thing else that related to him; so that the recovery might become a recovery with double voucher only, and might pass as of the last *Easter* term.

A recovery may be amended by striking out the voucher of a vouchee, whose acknowledgment was taken without a *dedimus*.

[ 60 ]

The Court permitted the amendment.

---

PEARCE v. HOOPER and Others.

July 2.

TRESPASS for breaking and entering the plaintiff's close, called *Coldrinick* Wood, and cutting down the coppice and underwood there growing, and seizing, taking, and carrying away the same. The defendant pleaded not guilty. Upon the trial of this cause at *Launceston*, at last *Spring* assizes for the county of *Cornwall*, before *Graham*, B., it appeared, that by a lease bearing date the 9th day of *March* 1766, *Sir Christopher Freise* granted to *Thomas Pearce*, for a term of 99 years, determinable on three lives, all that messuage and tenement, with the appurtenances, called *Coldrinick*, then in the occupation of *Thomas Pearce*, excepting thereout all timber trees

If a defendant calls on a plaintiff to produce at the trial a deed in his custody, to which the plaintiff is a party, and under which he claims a beneficial estate, it is not necessary that the defendant should call the attesting witness to prove when produced.

the due execution of the deed  
and

1810.

PEARCE

v.

HOOPER.

[ 61 ]

and saplings, with liberty for the lessor to enter and cut them. The lessee was dead: and the plaintiff was his son, and had for some years been in possession of the premises demised by the lease, as executor to his father. The place in question was a wood, containing about 15 acres, adjoining to *Coldrinick* tene-ment, and called *Coldrinick* Wood, which the plaintiff now claimed as part of the estate at *Coldrinick*. At a public auc-tion, for selling in lots several estates of the proprietor of these premises, held on the 21st of *November* 1808, the thirty-second lot exposed to sale was described to be the fee-simple of *Cold-rinick* estate, then in the possession of the plaintiff, and con-taining 45 acres. The plaintiff was present in person, and was the highest bidder for this lot, and was declared the purchaser. The thirty-third lot, which was next put up to sale, was de-scribed in the particular to be the fee-simple of *Coldrinick* Wood, in hand, containing 15 acres, with the underwood and timber thereon, and immediate possession thereof to be given. The plaintiff, by his agent, bid for this lot also. He did not, at the time of the sale, claim the property of it to be his own; nor did he object to the sale. This lot was bought in; but the defendant, *Hooper*, afterwards became the purchaser, by pri-vate contract; and at a subsequent time, with his servants, en-tered thereon, and cut and carried away a part of the under-wood and alders, being of such a description, that, if the place in which, &c. were demised by the lease of 1764, the wood taken was not reserved to the lessor under the exception therein contained. The plaintiff gave some evidence of his having for several years had the occupation of the wood, by depasturing his cattle therein, making the hedges and fences thereof, and thinning out the underwood, and taking it for his own use. The defendant proposed to shew, not only that this wood was not comprehended in the plaintiff's purchase of *Coldrinick* estate, but that since his purchase was commensurate with the premises demised by his lease; his taking a conveyance which excluded the wood, was evidence against him that he knew that the wood had never been demised to him by the lease; and with this intent the defendant gave notice to the plaintiff to produce, upon the trial, the indenture of lease and release, wherein the vendor had conveyed to him *Coldrinick* estate, by a description limited to a specific number of acres; which would necessarily exclude *Coldrinick* Wood. The plaintiff ac-cordingly produced these deeds; but the defendant not being prepared

[ 62 ]

prepared with the attesting witnesses to prove the execution of them, it was contended on the part of the plaintiff, that without such proof they could not be received in evidence. On the other hand, the defendant contended, that since these instruments came out of the hands of the plaintiff, under a notice to produce them, and contained his title to the premises, (if he had any title,) it must be considered that further proof of the execution of them was unnecessary. *Graham, B.* was inclined to receive the evidence, but, upon the authorities cited, rejected it, reserving the point; by the production of the original deeds the defendant was incapacitated from giving in evidence a copy of it, with which he was prepared; and the jury found a verdict for the plaintiff.

*Lens, Serjt.*, in last *Easter* term, moved for a rule *nisi* to set aside the verdict; and to have a new trial on account of the rejection of this evidence: he admitted that in a recent *nisi prius* case, *Wetherston v. Edgington*, 2 *Campb.* 94., the rule in *Gordon v. Secretan*, 8 *T. R.* 548., had been adhered to; but he observed that if the plaintiff had brought an action directly upon this instrument, the Court would have enabled him to prove the execution of it, by compelling the defendant, under a rule of the Court, to produce it for inspection. *Blakey v. Porter*, ante 1. 386. Perhaps, where the plaintiff claimed only indirectly through the medium of that instrument, the Court might not think fit to exert that interference; but it was nevertheless reasonable that the plaintiff should not be precluded from proving his case, because the defendant might think fit to withhold from him the knowledge of the names of the attesting witnesses. It was of the greatest importance that this point should be settled. The Court granted a rule *nisi*.

*Best, Serjt.*, in shewing cause against the rule, first contended, that as the plaintiff had, under the lease of 1764, a title to the underwood at least, whether the fee-simple of the soil had been since conveyed to him or not, the Court ought not to send this to a new trial; because if they did, upon the lease, the plaintiff must necessarily obtain a second verdict similar to the first. But the Court held that they could not say that the effect of this evidence, if admitted, might not very materially alter the case; and that the question therefore was, whether a deed coming out of a man's hands, to which he himself is party, is admissible in evidence against himself, without any proof of attestation? Upon which *Best* argued, that it was incumbent on the party calling  
for

1810.

PEARCE  
v.  
HOOPER.

[ 63 ]



1810.  
 —  
 PEARCE  
 v.  
 HOOPER.

[ 64 ]

for the deeds to prove the execution of them. The point had been decided in *Gordon v. Secretan*, 8 T. R. 548., where a declaration on a policy averred the plaintiffs to be interested to the amount of the insurance; and the defendant, meaning to dispute that fact at the trial, gave them notice to produce certain articles of agreement between them, (who were also owners of the ship,) and the captain, whereby, as he contended, it would appear that the captain, who was not a plaintiff, was interested in one-third of the neat profits of the cargo, and that consequently the defendant, who had paid into Court more than the amount of the other two-thirds, was entitled to a verdict. The plaintiff produced the instrument, attested by two witnesses, and insisted that the defendant must call one of them to prove the execution: against this, the case of *The King v. Middelzoy*, 2 T. R. 41., was strongly urged, but Lord *Ellenborough*, C. J. said, that that case had been since over-ruled; and that the notice given to the opposite party for the production of an instrument at trial, did not relieve the party calling for it from the necessity of proving it when produced by the subscribing witness. If it were so, it would follow that if a party were fixed with the possession of an instrument affecting his property, however questionable its execution might be, and even though he had impounded it because it was forged, or had been obtained by fraud; the party attempting to avail himself of it would, according to this argument, be relieved from the necessity of calling the subscribing witness. This case, which has been so recently decided, is not distinguishable from the present: the agreement there called for was, like the conveyance here, an instrument to which the plaintiff was a party, and which was in the hands of the plaintiff. It is immaterial what are the contents of the instrument; the only questions to be asked are, who are the parties to it, and in whose hands is it found. This decision has, ever since it was pronounced, been acted on at *nisi prius*, and there is much reason in it. A party who does that which in fairness and in duty he is bound to do, by producing upon notice any instrument he has in his hands, does not thereby dispense with the proof which is required in all other cases, the testimony of the attesting witness, who perhaps may know some fraud, or other peculiar circumstances under which the execution was obtained.

*Leas, contra*, was stopped by the Court.

MANSFIELD, C. J. There can be no doubt in this case. The case decided before Lord *Ellenborough* might be perfectly right:

the mere possession of an instrument does not dispense with the necessity which lies on the party calling for it, of producing the attesting witness. An \*instance is properly put in the case of a will, cited in *Gordon v. Secretan*, as having been tried before Lord *Kenyon*; for supposing that an heir at law is in possession of a will, and the devisee brings an ejectment, and calls on the heir to produce the will; there the heir claims, not under the will, but against the will, and it would be very hard that the will should be taken to be proved against him, because he produces it: but that is very different from the case where a man is called on to produce the deed under which he holds an estate. The plaintiff has no interest in the fee-simple of the estate, if this deed does not convey it: consequently, if he produces the deed under which he claims, shall it not be taken to be a good deed so far as relates to the execution, as against himself? There must necessarily, therefore, be a new trial in this cause.

The rest of the Court concurring,

Rule absolute.

MORGAN, on the Demise of DOWDING, Esq. v. BISSELL.

July 2.

THIS ejectment was tried at the *Hereford* spring assizes 1810, before *Lawrence*, J. and a verdict was taken for the plaintiff, with liberty for the defendant to move to set it aside, and enter a nonsuit, in case the Court should be of opinion, that the instrument put in evidence amounted to a lease of the farm in question. The instrument, when produced, appeared stamped with a sixteen shilling agreement stamp, and with a thirty shilling deed stamp also: it was dated on the 2d of *October* 1806, and the contents were in substance as follows: "Mr. *Dowding* agrees to let to Mr. *Bissell* all that farm in the parish of *Cradley*, (except 3 pieces of land, containing 5 acres or thereabouts, and except all trees, saplings, coppices, woods, and underwoods, with liberty to fell and carry away the same,) to hold from the 29th of *September* last, for the term of 21 years, determinable at the end of the first 14 years on 12 months' notice, at the yearly rent of 22*l.*, payable on the 25th of *January* yearly, and at and under all other usual and customary covenants and agree-

mentioned, a proportionate abatement should be made in respect of certain excepted premises; for until that was apportioned, the lessor could not distrain.

And a stipulation that the tenant should hold at and under all usual covenants as between landlord and tenant where the premises are situate; for it may be disputable what are usual covenants.

ments,

1810.

PEARCE  
v.  
HOOPER.  
[\*65]

Whether an instrument shall be a lease, or

[ 66 ]

only an agreement for a lease, depends on the intention of the parties, as it is to be collected from the instrument.

Strong circumstances of inconvenience apparent on the instrument, if it should be construed as a lease, indicate the intention of the parties that it should be an agreement only.

Such a stipulation that out of the rent

1810.  
 ———  
 MORGAN,  
 Lessee of  
 DOWDING,  
 v.  
 BISSELL.

[ 67 ]

ments, as between landlord and tenants, where the premises are situate. Mr. *Bissell* to spend six waggon loads of *Worcester* dung annually, over and above what is made upon the land; to remove the stocks in *Pontix Pitch*, (except the pear trees,) into or round the piece of land called *Old Cradley*, at his own expense: Mr. *Dowding* to allow 26*l.* a-year for manure, 10 loads to be spent annually on the meadow land;—to erect a cowshed, pitch the stable, and pale the foldyard;—to put new gates where wanting; the fold-yard to be completed in a month from this time; the same to be kept in repair by Mr. *Bissell*, being allowed timber in the rough; to have the use of limestone in the coppice adjoining, for the farm, and for sale 150 loads: to allow a proportionate part of the rent from *Michaelmas* to *Christmas*; to put and keep the tiling in repair during the term: to allow a proportionate part of the rent for the three pieces of land above excepted. Witness our hands, 1st *October* 1806, *John Dowding*, *Joseph Bissell*.” This instrument was signed on unstamped paper, at the office of the attorney for both parties, who afterwards, about the end of the year 1809, without any especial direction from the defendant, caused it to be stamped with an agreement stamp, but afterwards, in *February* 1810, a short time before the trial, caused it to be stamped with a lease stamp at the defendant’s request. The defendant entered on the farm in pursuance of the agreement, as from *Michaelmas* 1806, and paid rent. A draft of a lease was afterwards prepared, but the parties being unable to agree on the covenants to be inserted, it never was executed. In *January* 1808, the defendant received notice to quit at *Michaelmas* 1809. In order to shew that this instrument amounted to a lease, for the defendant the case was cited of *Poole v. Bentley*, 12 *East*, 168.; but for the plaintiff the distinction was taken, that there the concluding words, “ this agreement to be considered binding till one fully prepared “ can be produced,” made that to be a lease; but that the general rule was, whether a future instrument is contemplated. *Lawrence*, J. saw nothing in this paper that looked to a future lease, and what passed afterwards was not material. Where there is an instrument, by which it appears that one party is to give possession and the other to take it, that is a lease, unless it can be collected from the instrument itself, that it is an agreement only for a lease to be afterwards made.

*Williams*, Serjt. having in this term obtained a rule *nisi* that the verdict might be set aside and a nonsuit entered,

*Best*,

*Best*, Serjt. now shewed cause. He contended, that the intention of the parties was to be collected, not merely from the contents of the instrument, but from all ancillary circumstances. It was, however, clear, even from \*the contents of this paper, that it was not the instrument intended to regulate the interests of these two parties during the term agreed on. The relation of landlord and tenant is not complete unless the landlord can distrain. In the beginning of this instrument is an agreement for the yearly rent of 226*l.*, but in a subsequent part of it is a stipulation, that the landlord shall allow a proportionable part of that rent to be deducted in respect of the three excepted closes. Until that proportion was ascertained, there was no fixed rent, consequently no distress could be taken. It is further stipulated, that the demise is, at and under all other usual covenants. A covenant necessarily implies, that the terms are to be defined by deed under seal, whereas this instrument was not under seal; and that the defendant understood it to be an agreement only, may be inferred from the circumstance of an agreement stamp being affixed to it, and still more strongly from the circumstance of a draft of a lease being afterwards prepared by the direction of the parties, and broken off because they could not agree what were the covenants to which this contract bound them. Besides, if this were the final instrument, it would be necessary in declaring thereon, first, to aver and prove what were usual and customary covenants, which would be extremely inconvenient, and never could have been the intention of the parties. [*Lawrence*, J. The argument is not, that no further instrument was intended, but that the first instrument conveys an interest as a lease, and that the future lease is in the nature of a further assurance.] This is very distinguishable from *Poole v. Bentley*, which was an agreement for a building lease, and there a separate lease was to be granted of each house successively, as it should be finished, in order to make a distinct title and apportionment of ground-rent to each subordinate purchaser. Nothing of that sort appeared here: and the acts of the parties denote as strongly as any express declaration they could have made, their intention of having a lease. He also cited *Sturgeon v. Painter*, Noy, 128.; *Goodtitle, on demise of Estwicke*, v. *Way*, 1 Term Rep. 735.; *Doe, on demise of Coore*, v. *Clare*, 2 Term Rep. 739.; *Roe, on demise of Jackson*, v. *Ashburner*, 5 Term Rep. 163.; and though that case turned upon the want of a stamp, yet the executing an agreement without a stamp, indicated that the parties intended

VOL. III.

E

an

1810.

MORGAN,  
Lessee of  
DOWDING,  
v.  
BISSELL.  
[ \*68 ]

[ 69 ]

1810.

MORGAN,  
Lessee of  
DOWDING,  
v.  
BISSELL.

an agreement for a lease, not a lease; for an agreement stamp could always be afterwards affixed after execution, upon payment of the penalties; a deed stamp could not, until a very recent change made in the practice of the stamp-office. He also cited *Doe, on demise of Bromfield, v. Smith*, 6 East, 530.

*Shepherd and Williams, Serjts., contra.* Every instrument in writing must speak for itself, and the intention of the parties cannot be tried by parol evidence, or any acts or matters out of the instrument. It is not conclusive against its being a lease, that it thereby appears that some further instrument is to be prepared, for if it also appears that the possession was intended to pass by the first instrument, it is a good demise, notwithstanding the intention to make further assurance. *Drake v. Munday*, W. Jon. 231. S. C. Cro. Car. 207. *Tisdale v. Esser*, Hob. 34. Cro. Eliz. 33. *Waldon's case*. If one say to me, "you shall have a lease of my lands in D. for 21 years, paying therefore ten shillings *per annum*; make a lease in writing, and I will sign it." This was agreed to be a good lease by parol, although no writing be made of it; for the intent of the lessor is sufficiently expressed, and the making of it in writing is but for further assurance. 2 Bl. 973. *Baxter, on demise of Abraham, v. Browne*. The lessors agreed with all convenient speed to grant a lease to *Browne*, and they thereby set and let to him the premises; the agreement then proceeded to stipulate that the lease should contain usual covenants, and certain special ones, in one place whereof occurred the words "this demise." And the Court held that the instrument amounted to a lease. [*Lawrence, J.* The circumstances there shewed the party's intent to be so; on which the Court relied in giving judgment.] They admitted that some of the modern cases had relaxed the old rules, and countenanced the idea that where the parties contemplated a future instrument, that intention should control the words of present demise. But most of the cases where it had been so held, were cases in which circumstances strongly shewed the intention of the parties that the instrument should not amount to a lease, as in *Doe, d. Coore, v. Clare*; where, if it had been a lease, the lessor would have incurred a forfeiture of his copyhold. In the case of *Doe, on the demise of Bromfield, v. Smith*, a new limitation of the estate, in favor of the lessor's son, was to be made in the leases, which was not contained in the agreement; if, therefore, the possession had passed by the agreement, it would have passed unfettered by that limitation, which was not

[ 70 ]

to

to take place till a lease was executed. In *Goodtitle, ex dem. Estwicke, v. Way*, was an express agreement that leases with the usual covenants should be executed before *Michaelmas*. *Barry v. Nugent*, cited in *Roe v. Ashburner*, is a much stronger case than this; for there, although an express agreement for a future lease was inserted, the instrument was held to be a lease on account of the words of present demise. There is nothing on the face of this agreement by which the parties have bound themselves, or which renders it necessary for them, to have any future lease. If, in order to avoid the expense which long leases now occasion, and to save words, the parties chuse to frame a lease by demising according to the custom of the country, or under and subject to all usual covenants, it would be a good lease. It is not the less operative because extrinsic evidence must be given to try what is the custom of the country. Provisos for the lessor's re-entry in case the lessee shall not cultivate and manage the land according to the custom of the country are common. Powers to lease according to the custom of the country are frequent in settlements. What covenants are usual, is to be determined by matter dehors the settlement; and why may not it be so with regard to a lease? If a lease under seal had been granted for 21 years, at 22*l.* rent, *habendum*, by, under, and subject to all usual and customary covenants and agreements, that would have been a good lease without more. Every thing which requires to be specifically stated, and cannot be expressed by reference to other contracts, such as the removing the stocks, ascertaining the quantity and description of manure, and the particular buildings, repairs, and improvements to be performed, is already specified. If the lessor could not distrain in this case, there are many leases on which no distress can be taken; as where there is a liberty for the landlord to resume a part of the premises, abating out of a gross reserved rent, a proportionable rent or value for the part resumed: but the answer is, *id certum est, quod certum reddi potest*: and it is to be ascertained by appraisement. If there be an eviction for part of the premises demised, there shall be an apportionment of the rent; and there the amount is to be ascertained by a jury: it does not avoid the whole lease. [The Court, interposing, relieved them from answering the argument raised from the affixing first of an agreement stamp, and then of a deed stamp; the only thing to be considered was the intention of the parties at the time of executing this contract as therein expressed.] A covenant for a

1810.

MORGAN,  
Lessee of  
DOWDING,  
v.  
BISSELL.

[ 71 ]

1810.  
 ———  
 MORGAN,  
 Lessee of  
 DOWDING,  
 v.  
 BISSELL.  
 [ \*72 ]

future lease is often inserted in leases where it is not necessary, in order to avoid a doubt: besides, covenants for further assurance are common in leases, especially in the building leases of \*noblemen about this metropolis, who never grant their lessees access to their title-deeds, but instead thereof, insert this covenant. *Gainsford v. Griffith*, 1 *Saund.* 58. *f.* is a case of the assignee of a term recovering upon the assignor's absolute covenant for title. A lease need not to be under seal: and it is for the good of the commonwealth, and the advancement of agriculture, to uphold this sort of contracts, as leases. Upon the covenant for further assurance the defendant has two remedies, either to sue for damages on the covenant, or to go into a court of equity to enforce a specific performance of the covenant. *Iggulden v. May*, 9 *Ves.* 325. decided, both that a court of equity would enforce a covenant clearly expressed for renewal of a lease, and that the acts of the parties were not admissible as evidence to explain the meaning of the instrument.

MANSFIELD, C. J. This sort of question which we are now about to decide, is an extremely unpleasant one; the good sense is with the modern cases. When the party enters into that, which on the face of it appears to be an agreement, though there are words of present demise, yet, if you collect on the face of the instrument the intent of the parties to give a future lease, it shall be an agreement only. It is true, as hath been said, that in most of the cases there have been positive agreements for a future lease, and that there is none such here; but the real question is, what did these parties intend? Now the plaintiff's lessor *agrees to let* to the defendant, (not using the strong words which are in *Barry v. Nugent*, and other cases,) all that farm, except, &c., and he goes on to make particular provisions, and then he says, "at the yearly rent of 226*l.*, and under all usual covenants and agreements as between landlord and tenant where the premises are situate:" this is not the language in which a lawyer would introduce into a lease the technical covenant for further assurance, but contemplates the entire making of an original lease. Then follows a partial apportionment of the rent from *Michaelmas* to *Christmas*, which I do not understand; for the date is the 2d of *October*: but then comes an apportionment of the rent for the excepted premises. Now, do these words imply, or not, that one of the parties should grant and the other accept a further lease? Would any landlord or tenant of common sense enter on a term for 21 years, without ascertaining

[ 73 ]

ascertaining what were the terms on the one side and the other by which they were to be bound for 21 years, and what was to be the rent apportioned for the excepted premises? The landlord thinks he is injured by a breach of covenant, and brings an action; and then it is to be gone into what are the proper covenants according to the custom of the country! In like manner they must go to a jury to see what is the rent of the excepted land. Does not then this agreement clearly imply that the parties meant to have a lease? The landlord did not mean that the tenant should hold, nor did the tenant mean that the landlord should have the rent, without previously ascertaining what was the rent, and what were the terms on which he should hold. We must therefore presume that they meant to have a further lease: and then, according to the doctrine of the modern cases, no present interest is conveyed under this instrument; and it would be a very wise rule that wherever one person is about to grant, and another to take a lease, until the lease was actually executed, no interest at law should pass. As to the question, what are usual covenants, it is an endless source of litigation. I have known parties long hung up at an inquiry before a Master of Chancery, what are the usual covenants, and it is the extreme of folly either to give or take possession under such an agreement, till a lease is executed; but the convenience of parties sometimes requires it.

Rule discharged.

---

—, Demandant; SHAW, Tenant; HAWKINS, Vouchee.

1810.

MORGAN,  
Lessee of  
DOWDING,  
v.  
BISSELL.

[ 74 ]

**ROUGH**, Serjt. was permitted to amend a recovery suffered of a messuage and garden in *Albemarle-street*, which garden extended to *Dover-street*, and on part whereof another messuage, fronting to *Dover-street*, had lately been built, by inserting a specific description of the last-mentioned messuage, upon an affidavit that it was intended to pass, and the deed to lead the uses conveying all the estate of the vouchee.

July 3. (a)

Recovery amended by inserting a messuage recently built upon part of the premises

(a) On this day, and during the remainder of the term, *Chambre, J.* was prevented by indisposition from coming into Court.

Cox



1810.

July 3.

COX v. RODBARD.

No suggestion is necessary under 8 & 9 W. 3. c. 11. upon a warrant of attorney conditioned for payment by instalments.

THE defendant being indebted to the plaintiff in 1347*l.* 10*s.* for goods, gave the plaintiff a warrant of attorney to confess a judgment in the penal sum of 1500*l.* conditioned for the payment of 1347*l.* 10*s.* and interest, together with such sum as the plaintiff should have paid in continuing an insurance of the like amount on the defendant's life, which the plaintiff was thereby authorized to do, until the whole of the said debt should be fully paid by instalments, viz. 300*l.* on the 30th *October* 1809, and 1047*l.* 10*s.* together with interest, and also the premiums of insurance paid, on the 15th *April* 1810. Judgment was soon afterwards entered up on the warrant of attorney: and the defendant having paid the first instalment of 300*l.*, and the further sums of 84*l.* and 800*l.* only on account, the plaintiff issued a writ of execution, and levied 234*l.* upon the defendant's goods, to satisfy the residue.

[ 75 ]

*Williams*, Serjt. had on a former day obtained a rule *nisi* for setting aside the *capias ad satisfaciendum*, and restoring the monies levied, upon the ground that the plaintiff had not issued any writ of *scire facias*, nor executed any writ of inquiry thereon pursuant to the statute of 8 & 9 W. 3. c. 11.

*Shepherd*, Serjt. against the rule contended that no suggestion was necessary in this case.

*Williams* and *Best*, Serjts. in support of the rule, urged, that this warrant of attorney being given in a larger sum than the debt actually due, by way of penalty, conditioned for the payment of the instalments, there was as much reason why the statute should apply to require a suggestion in this case, as in the case of bonds conditioned for payment of annuities, the amount of the annuity payments being in all such cases sufficiently certain without the intervention of a jury, yet the statute required it.

The Court asked whether there were any instance of a suggestion being necessary where the security was merely a warrant of attorney; and observed, that if the doctrine contended for was correct, a writ of *scire facias* would be necessary upon every subsequent breach; which the defendant's counsel admitted, but could cite no instance where a suggestion had been held requisite on a warrant of attorney.

MANSFIELD,

MANSFIELD, C. J. This argument would extend to every warrant of attorney where the payment is to be made by instalments, so that it must be decided by a jury whether such instalments have been paid or not. But this case is not within the mischief intended to be remedied by the act, which was made to preclude the necessity of going into a court of equity. The common law courts have ever exercised an equitable jurisdiction over their own judgments and process. The plaintiff comes here to complain of an irregularity, not to seek redress on the merits. If it were necessary, the Court would direct an issue to try whether the instalments had been duly paid or not, but the plaintiff suggests nothing with respect to the merits. It is wholly a new motion.

1810.

—  
Cox  
v.  
RODBARD.

[ 76 ]

Rule discharged with Costs.

---

ROPER v. BUMFORD.

July 3.

THIS was an action brought to recover for the use and occupation of 50 acres of land in the parish of *Church Lynch*, in the county of *Worcester*. Upon the trial of the cause at the *Worcester* spring assizes 1810, before *Wood, B.*, it was proved that the defendant, being overseer of the poor, the plaintiff, with full knowledge of the irregularity of certain poor-rates which had been informally assessed upon the plaintiff for other land in the same parish, had directed the defendant's son, who was collecting rates for his father, to pay those rates upon the plaintiff's account, and to set them off against the rent; saying, he knew the levy was not a legal levy, but the rent should eat out the levy. The defendant sought to set off against 55*l.* 9*s.* rent, which was proved to have accrued, 33*l.* 4*s.* for bark sold, and these poor-rates so paid. The price of the bark was accordingly proved and set off, but *Wood, B.* thought the defendant was not entitled to set off the illegal levies: he thought it was like the case of the demand of money by a public officer, and a promise made to pay him, when the officer had no authority to exact the sum demanded, and he thought that promise would be void in law, and therefore could not be made the subject of a set-off. The jury accordingly found a verdict for the plaintiff, with 20*l.* 5*s.* damages.

If a landlord direct a tenant, who is overseer of the poor, to pay on the landlord's account, rates irregularly assessed on him, and promises that the levies shall eat out the rents, the tenant may set them off, or prove them as payment, in an action for use and occupation.

[ 77 ]

*Shepherd*, Serjt. having in *Easter* term moved to set aside the

1810.

ROPER

BUMFORD.

the verdict and have a new trial, upon the ground of a misdirection upon this point, and having obtained a rule *nisi*,

*Lens*, Serjt. now endeavoured to shew cause against the rule, contending either that the plaintiff's promise to allow these rates by way of set-off was without consideration, or that the defendant ought to have shewn that he had actually disbursed the rates to the poor, or paid the money over to the new overseer, of which he had offered no evidence. This was merely a promise to pay an illegal debt.

But the Court held that it was more than a promise, and was equivalent to an actual payment of the money into the plaintiff's hands, and made the

Rule absolute.

[ 78 ]

July 3.

DOE, on the Demise of SHEPPARD, v. ALLEN.

If a lessee exercises a trade on the demised premises, by which his lease is forfeited, the landlord does not, by merely lying by, and witnessing the act for six years, waive the forfeiture.

Some positive act of waiver, as receipt of rent, is necessary.

But if he permits the tenant to expend money in improvements, *semble* that that evidence to be left to a jury of his consent to the alteration of the premises.  
*Per Mansfield, C. J.*

THIS was an ejectment brought to recover possession of a messuage and shop in *Northgate-street, Bath*, which the lessor for the plaintiff, by lease of the 18th day of *December* 1802, had demised to *William Dore*, his executors, administrators, and assigns, for the term of 28 years, determinable on lives; "provided, that if the lessee, his executors, administrators, or assigns, should, at any time thereafter during the term thereby granted, permit or suffer any person or persons to inhabit or dwell in or upon the demised premises, or any part thereof, who should therein use, exercise, carry on, or follow, (amongst other the trades therein enumerated,) the trade of a butcher, or any other dangerous, noisy, noisome, or offensive trade or calling whatsoever, or if all, or any one or more of the covenants, clauses, and agreements therein contained on the part of the lessee, his executors, administrators, or assigns, should, during the term, be infringed or broken in any respect whatsoever, then it should be lawful for the lessor to re-enter." And the lessee covenanted "that he, his executors, administrators, and assigns, would not, during all or any part of the term, exercise upon all or any part of the premises, the trade of a butcher, &c. or any other dangerous, noisy, noisome, or offensive trade or calling whatsoever." Upon the trial of this cause at the *Taunton* spring assizes 1810, before *Graham, B.*, it appeared that the lessor *Dore* had, in *July* 1803, for the consideration of 95*l.*, assigned the

the premises to the defendant; who thereupon partitioned off the shop into two separate apartments, in one of which he carried on the business of a fishmonger, and the other he had let on lease to *Loder*, a butcher, who therein\* carried on his trade. The plaintiff, from the time of the assignment to the time of the trial, continued to live next door to the demised premises, and was witness to their conversion to these obnoxious uses. The defendant had paid his rent during that period to *Dore*, and could not prove any payment of rent by *Dore* to the plaintiff's lessor subsequent to the alteration. For the defendant it was urged, that the circumstance of his having so long seen the nuisance, without interfering, was evidence of a waiver of the forfeiture; but *Graham*, B. thought there must be evidence of some positive act of waiver, and that mere silence was not sufficient. The jury found a verdict for the plaintiff.

*Lens*, Serjt. having in *Easter* term obtained a rule nisi to set aside the verdict and have a new trial,

*Best*, Serjt. shewed cause. [*Mansfield*, C. J. observed, there was a circumstance which had not been adverted to: it was suggested, that a great deal of money had been laid out by the defendant in altering and improving these premises: that was not merely a circumstance for the consideration of a court of equity: if the plaintiff lay by and saw that laid out, it was a strong circumstance from which a jury might imply consent to the alteration.] No such fact appears on the judge's report. The covenant is unquestionably broken, and the only question is, whether there has been any waiver. How long must a man lie by, before his long-suffering shall amount to a waiver? It has never yet been held that lying by would constitute a waiver of a breach of covenant. But if the defendant has laid out money, of which there is no evidence, it is his own folly that he did not first tender his rent: if that had been received, he might have spent his money safely; without that precaution, he was spending it in his own wrong.

*Lens* in support of the rule. It is not necessary there should be an actual payment of rent to constitute a waiver; that is only *exempli gratia*: any other evidence of waiver is equivalent. It ought to have been left to the jury, whether the plaintiff's lessor had made his election to determine the lease or to confirm it; for the lease is not made absolutely void, but only rendered voidable by the breach of covenant; and the lessor must elect whether he will enter or not. However, nothing in the evidence

1810.

DOE,  
Lessee of  
SHEPPARD,  
v.  
ALLEN.  
[ \* 79 ]

[ 80 ]

1810.

*Dore,*  
Lessee of  
*SHEPPARD,*  
v.  
*ALLEN.*

evidence shews that, during this long period, the rent was not accepted; and the jury ought to have presumed that it was. The plaintiff might easily have proved that the lessor never received this rent, and might have shewn the reasons why he did not. [*Heath, J.* The plaintiff is not bound to prove a negative.] It ought to have been left to the jury, whether the plaintiff had not, at some one moment, assented to these acts.

*MANSFIELD, C. J.* I do not know how it is possible to help this defendant. The lessor having let to *Dore*, with a covenant not to exercise certain trades, *Dore* underlets to the defendant, and the defendant trades contrary to the covenant: the plaintiff lives next door, and must be taken to have known the alterations in the state of the premises. Supposing no money to have been laid out in improvements, and of that there is no evidence, the suffering him to go on, is an indulgence to the tenant; after a time the lessor brings an ejectment, and what you ought to prove is, that he consented to the change: now you have not shewn that he has since, either directly or indirectly, received any rent; and if he had, it is probable he gave *Dore* a receipt, and *Dore* would have produced it to uphold the beneficial lease.

[ 81 ]

*HEATH, J.* was of the same opinion. Forfeitures of lease stand on the same ground with forfeitures of copyhold; and there are a great many cases in the old books, where it is held, that a mere knowledge and acquiescence in an act constituting a forfeiture, does not amount to a waiver: there must be some act affirming the tenancy.

*LAWRENCE, J.* The rule must be discharged.

Rule discharged.

July 3.

HALHEAD v. ABRAHAM.

After nonsuit for a variance, in an undefended action on a replevin bond, the Court permitted the record to be amended, and a new trial to be had.

**T**HIS was an action on a replevin bond. Upon the trial of the cause at the *Lincoln* spring assizes 1810, before *Bayley, J.*, the defendant did not appear, and the learned judge, on comparing the record of the declaration with the bond produced in evidence, discovered a fatal variance, three dozen of chairs being mentioned in the bond, and four dozen in the declaration, upon which the plaintiff was nonsuited; but *Bayley, J.* said that, if he had been a judge of the Court where the action

was

was brought, he would have amended the declaration *pro tanto* at the time of the trial.

1810.

*Shepherd*, Serjt. in *Easter* term, moved to set aside the nonsuit and amend the declaration, on the authority of *Grundy v. Mell*, 1 *New Rep.* 28., and *Holland v. Hopkins*, 2 *Box. & Pull.*, 243., where the Court permitted amendments after trial, and he said it ought the rather to be permitted in this case, because, as the defendant did not appear at trial, he had incurred no costs.

HATHEAD  
v.  
ABRAHAM.

MANSFIELD, C. J. allowed it on payment of the costs occasioned by the amendment, that is, in this case, the same costs as if it had been amended before the trial, by summons before a judge in *London*. [When amendments are made at the trial, they are made without costs.]

Rule absolute.

---

### O'CALLAGHAN v. Marchioness THOMOND.

[ 82 ]

July 4.

THIS was an action of debt against the defendant, as (a) executrix of the late Marquis of *Thomond*, upon simple contract for 7000*l.* The first count set out certain *Irish* statutes of 9 *Geo. 2. c. 5.* and 25 *Geo. 2. c. 14.*, whereby conusees of judgments are allowed to assign them, and the assignees of such judgments may sue out execution, and bring actions of debt on such judgments, in their own names. The count further stated that *Lawrence Comyn*, in *Trinity* term, in the 42d year of his Majesty's reign, in the Court of Common Bench in *Ireland*, before the Right Honourable *John Lord Norbury* and his brethren, justices, &c., by the consideration and judgment of the said Court, recovered against the testator as well a certain debt of seven thousand pounds sterling money, that is to say, of current money of *Ireland*, as also 4*l.* 4*s.* 6*d.* of like money for his costs, and then proceeded to shew an assignment to the plaintiff, and a memorial enrolled in pursuance of those statutes. There was a second count on an account stated. To the first count, there was a general demurrer and joinder. The statute 9 *Geo. 2. c. 5.* after reciting that judgments, statutes staple, and statutes merchants, are frequently assigned for valuable considerations, and to protect the purchase of estates, but are no more than equitable securities in the hands of the

The assignee of an *Irish* judgment by cognovit may sue in this country in his own name.

The *Irish* statutes 9 *G. 2.* and 25 *G. 2.*, which permit conusees of judgments to assign them, and the assignees to sue in their own names, are confined to judgments upon cognovits.

(a) See note, *Vaughan v. Plunkett*, at the end of this case.

assignees,

1810.

O'NEAL-  
LAGHANMarchioness  
THOMOND.

[ 83 ]

assignees, and that assignees of such judgments, statutes staple, or statutes merchants, as the law then stood, could not revive or discharge the same in their own names, but in the name of the conusees of such judgments, statutes staple, or statutes merchant, or their representatives, which was often attended with very great inconveniences, and the conusee might, after such assignment, enter satisfaction on the record of such judgments, statutes staple, or statutes merchant, without the knowledge or consent of the assignee, enacts, "that where any conusee or conusees of a judgment or judgments, statute staple, or statute merchant, his, her, or their executors or administrators, shall assign the same, such conusee or conusees, his, her or their executors or administrators, shall also perfect a memorial of such assignment," with such formalities as therein are mentioned. The second section enacts, "that after such memorial enrolled, such assignee or assignees, and no others, may, in their own names, revive such judgment, statute, &c. and take out execution, discharge the same, and enter satisfaction on the record; and that the conusor or conusors of such judgment or judgments, statute, &c., his, her, or their executors, administrators, or assigns, may, upon payment to such assignee or assignees, plead payment specially to such assignee or assignees." The stat. 25 Geo. 2. c. 14, which is entitled "An act to explain and amend" the former act, after reciting that some doubts had arisen upon the construction of the former act, so far as the said act relates to the assignment of judgment and statutes in the several courts of law therein mentioned, for the removing of such doubts, declares, "that every assignee or assignees of every judgment or judgments, statute staple or merchant, that were then assigned, or which thereafter should be assigned on record, by virtue of the said act, his, her, or their executors, administrators, or assigns, may not only revive such judgment, &c. from time to time, in his, her, or their own name or names, and take out one or more execution or executions thereon for the recovery of his, her, or their demands thereon, as by the said act among other things is directed, but also that such assignee or assignees of such judgment, &c. now assigned or hereafter to be assigned by virtue of the said act, his, her, or their executors, administrators, or assigns, may bring an action of debt, or otherwise proceed or sue thereon, in his, her, or their own

[ 84 ]

"own name or names, and be considered to all intents and purposes in the place, stead, and condition, either in law or equity, of the assignor or assignors."

*Peckwell*, Serjt., in support of the demurrer, admitting the general principle, that the law of one country would recognize and enforce obligations raised by the law of another country, contended nevertheless, that the rule extended only to the substance of the contract, but could not transfer to another country the form of recovering, nor contravene the general principle of the *English* law, that *choses in action* were not assignable; consequently that no action could be sustained in this Court on the judgment, otherwise than in the name of *Comyn*. Nevertheless, he was aware of the case of *Innes v. Dunlop*, 8 T. R. 595. But the Court intimating a strong opinion against him upon this ground; he objected that on the face of this declaration the plaintiff did not bring himself within these statutes, which extended only to judgments by *cognovit*; whereas if this form of declaration were sufficient, there was no assignee of a judgment recovered in any shape whatever in *Ireland*, whether upon demurrer, verdict, or by default, who could not prove the allegation contained in this declaration, that the plaintiff recovered by the consideration of the Court: this would be the inevitable consequence, if for consequence the Court could read recoveror. There was a known distinction between the two words: conusee meant only the plaintiff to whom a judgment was acknowledged. The *English* statute 32 Hen. 8. c. 5. "for the continuation of debts upon execution," distinguishes between recoverers, obligees, and recognizees. The *Irish* legislature contemplated only such judgments which may be said to be in the nature of obligations, in like manner as fines and common recoveries, though judgments of the Court are in the nature of common assurances of land. They would have used the word recoverers, if they had meant to extend the act to all judgments whatsoever, and had not meant to confine it to judgments by *cognovit*.

*Runnington*, Serjt., *contra*, contended that the stat. 25 G. 2. was meant to apply to judgments of all sorts, and between all parties whatsoever: for, although the stat. 9 G. 2. applies to judgments by *cognovit*, there are no means to distinguish on the record of a judgment, whether it passed on a *cognovit* or otherwise. But, all the Court and the officers denying this, he contended that it was only matter of form, and inasmuch as there

1810.

O'CAL-  
LAGHANv.  
Marchioness  
THOMOND

[ 85 ]

was



1810.

O'CAL-  
LAGHAN  
v.  
Marchioness  
THOMOND.

was no special cause of demurter assigned, no advantage could now be taken of it.

The Court, however, being unanimous that it was matter of substance, he prayed leave to amend, which was granted, if, upon inquiry, he should find that the judgment was in fact a judgment by confession, so that he could avail himself of the indulgence.

*Assumpsit* lies  
on an Irish  
judgment since  
the Union.

(a) *Vaughan v. Plunkett*, C. B. June 5, 1810, sittings at Westminster after Easter term cor. *Chambre, J.* *Assumpsit* upon a judgment in the Court of Exchequer in Ireland. *Dampier*, for the defendant, objected that since the Union of Great Britain and Ireland, *assumpsit* could no longer be maintained upon an Irish judgment, because it was a record of the United Kingdom, and might be brought over to the House of Lords here. *Chambre, J.* It was removeable to the House of Lords before the Union: but I will reserve the point. *Verdict* for the plaintiff, but the defendant never moved the case.

[ 86 ]

July 4.

SOULSBY, Assignee of HALLIDAY, a Bankrupt, v. LEA.

If the plaintiff retains the venue upon the usual undertaking to give material evidence within the county, yet if the plea and issue joined be such as to render that evidence irrelevant, the performance of the undertaking is dispensed with.

Thus, if the local evidence be the trading of a bankrupt, or a petitioning creditor's debt within a county, yet if the defendant do not give notice of his intention to dispute the commission under 49 G. 3. c. 121. s. 14., so that the mere production of the commission and proceedings under it proves the trading and petitioning creditor's debt, *semble* that the undertaking needs not to be further complied with.

*SHEPHERD*, Serjt. had on a former day obtained a rule *nisi* to change the venue in this case from Yorkshire to Worcester.

*Clayton*, Serjt. now shewed cause, upon the ground that the plaintiff was the assignee of a bankrupt, and it might happen that the defendant might dispute the commission of bankrupt under which he derived title: he therefore claimed, that if the defendant did dispute it, the plaintiff might be permitted to undertake to give material evidence in Yorkshire, inasmuch as the trader had resided, and the commission was opened, at Bradford, in that county; and thereupon he would be entitled to have the venue restored: but if the defendant would not dispute the commission, he did not wish to have it restored. The stat. 49 G. 3. c. 121. s. 14. requires the party who means to dispute a commission, to give notice of his intention: and unless that notice is given, it is now unnecessary to do more than to give in evidence the commission and the proceedings under it; but the notice need not be given by a defendant until the time of plea pleaded, whereas, a venue is changed before plea. He conceived, therefore, that the circumstance of the plea not being accompanied with such a notice, would render unneces-

sary

sary the local evidence, which, without such notice, would be material and necessary; and he cited the case of *Cockerell v. Chamberlayne*, ante 1. 518. to shew that where the plea is such as to render it irrelevant to the issue to prove the local circumstances, which the plaintiff undertook to prove arising within the county, the undertaking to give material evidence in the county where the venue is laid, is thereby dispensed with.

MANSFIELD, C. J. put him to his election whether he would undertake to give material evidence in *Yorkshire*?

LAWRENCE, J. observed, that if, upon consideration, he felt confident that the case cited applied to the present case, he was safe in undertaking to give material evidence, in the present circumstances: and the rule was accordingly discharged, on the usual undertaking of the plaintiff.

1810.

SOULSBY  
v.  
LEA.

[ 87 ]

**SOUTHCOTE, Executrix of SOUTHCOTE, Esq. v. HOARE, Bart.**

July 4.

**T**HE plaintiff, as executrix of the last will and testament of *Thomas Southcote*, deceased, declared in covenant against the defendant upon an indenture of lease of 3 parts, made between the said *Thomas Southcote* in his lifetime, (therein described as tenant for life of the real estate of *John Southcote*, deceased,) of the first part, *Thomas Charlton*, (therein described as the receiver appointed by the High Court of Chancery of the rents and profits of the estates of the said *John Southcote*,) of the second part, and the defendant of the third part: whereby, after reciting that *John Southcote*, by his last will, had given a leasing power, under the restrictions therein mentioned, to every person to whom any estate for life in the premises was thereby devised, when and as they should respectively be in the actual possession thereof, the said *J. Southcote* demised to the defendant the manor, farm, lands, and premises, called *Bruham Lodge*, in the county of *Somerset*, therein particularly described, with the appurtenances, to hold the same unto the defendant for the term of 16 years. And the defendant thereby, for himself, his heirs, executors, and administrators, covenanted to and with the said *Thomas Charlton*, and other the receiver or receivers for the

By indenture tripartite between A. 1, B. 2, C. 3. A., tenant for life, demised to C.; and C. covenanted with B. (a receiver,) and other the receiver or receivers for the time being, and to and with such other person, who, for the time being, should be entitled to the freehold, and to and with every of them. A. died; held that his executrix

[ 88 ] could not maintain covenant for breach in her testator's lifetime, but that the action was joint, and survived to B.

A covenant with two and every of them is joint, though the two are several parties to the deed.

1810.  
 ———  
 SOUTHCOTE  
 v.  
 HOARE, Bart.

time being, (and to and with such other person or persons as, for the time being, should or might be entitled to the freehold or inheritance, or to the rents and profits of the said premises,) and to and with every of them, by the said indenture, amongst other things, to repair the premises, and the same, so repaired, at the determination of that demise, to yield up to the said *Thomas Charlton*, or such future receiver or receivers, or other person or persons for the time being entitled as aforesaid; and not to suffer cattle to feed in the coppices demised, nor fell, damage, or dispose of any timber trees or saplings. By virtue of which demise the defendant entered and was possessed, and continued possessed until the death of the said *T. Southcote*, the reversion of and in the same premises with the appurtenances belonging to the said *Thomas Southcote*, as tenant for the term of his natural life, under and by virtue of the said will, and the said *Thomas Southcote* during all that time being entitled to the freehold of the said premises, to wit, as tenant thereof for the term of his natural life. And the plaintiff averred breaches in the life of *Thomas Southcote*, in not repairing, in depasturing cattle in the woods, and in cutting and destroying timber, by the defendant himself, and the like breaches committed by one *Thomas Andrews*, who was then and there the assign of the defendant, and so the defendant had not kept his covenants with the testator *T. Southcote* in his lifetime, or with the plaintiff, executrix as aforesaid, since his death; to the damage of the plaintiff, with a profert of the letters testamentary. To this declaration the defendant pleaded in bar, that the said *Thomas Charlton* duly sealed, and as his act and deed delivered the said indenture, and survived the said *Thomas Southcote*, and was still in full life. There was a further plea, traversing the breaches assigned. The plaintiff demurred to the first plea, and the defendant joined in demurrer.

[ 89. ]

*Shepherd*, Serjt. endeavoured to support the demurrer. He contended that inasmuch as the covenant was to and with every of them, there were several covenants. The design was, that there should be one several covenant with *Charlton*, which, if *Charlton* had ceased to receive, and a new receiver was appointed, would be a covenant to and with the new receiver, but which, if no new receiver were appointed, would be extinguished; and that there should be one other several covenant with *Thomas Southcote*, and other the person entitled to the rents and profits for the time being, which covenant would remain although the

other

other should be extinguished. It has been held that where the interest is joint, the word each makes no difference, and does not constitute a separate covenant, but here the interests are several, and therefore every, which is synonymous, shall have that effect. *Thomas Southcote* was interested to receive the rents and profits on his own account during his life: the office of receiver had a view to the interests of some other parties, which makes this case distinguishable from those of *Rolls v. Yate*, *Yelv.* 177. S. C. by name of *Yate v. Rolles*, 2 *Gouldsb.* 207. *Yate v. Roules*, 1 *Bulst.* 25. *Slingsby's case*, 5 *Co.* 19. *Duke of Northumberland v. Errington*, 5 *T. R.* 522. *Anderson v. Martindale*, 1 *East*, 497. This is not an indenture by *Southcote* and *Charlton* of the first part, but by *Southcote* of the first part, and *Charlton* of the second part. Suppose the Court of Chancery should now take away the receivership from *Charlton*, without appointing another receiver, there would be no one who could sue on this covenant. This plea moreover is bad, because it does not shew that *Charlton* continues receiver.

*Best*, Serjt., who was prepared to support the plea, was stopped by the Court.

**MANSFIELD, C. J.** It may be the practice of the master's office to frame the covenants in this way, but I do not think it is. It is a strange thing. The demise is by the tenant for life. The master's office is much puzzled upon this subject, but in practice, they usually cause the receiver to demise under the order of the Court, who can convey no legal interest; but whenever they can, they get a tenant for life, or a trustee of the legal estate, to join. It is urged for the plaintiff, that to and with every of them, means with each of the two separately; but it would be very strange if it were so; it means, with every of the receivers and with the person entitled, jointly; and certainly it is important that the action should not be brought by a representative who pays no costs, but by some one that is liable to costs. *Charlton* must be taken to be receiver still.

**LAWRENCE, J.** There is a great deal of difference between covenants where the parties covenant jointly and separately, and where they covenant with them and every of them: in the former case the covenantees clearly have separate actions.

Judgment for defendant.

1810.

SOUTHCOTE  
v.  
HOARE, Bart.

[ 90 ]

1810.

July 4.

SWINNERTON v. Marquis of STAFFORD.

Where there has been but a short time for investigating a question of real property, of a doubtful and obscure nature, and of great value, although conflicting evidence has been left to the jury, and the Court does not think their verdict wrong, yet if the inheritance is to be bound for ever by the verdict, the Court will grant a new trial on payment of costs.

Antient grants are not to be received in evidence, unless they can be accounted for, as coming from the hands of some one connected with the estate to which they relate.

THIS was an issue under an inclosure act, to try whether the defendant, who was seised in fee of a tenement in the occupation of a tenant named *Knight*, had a right of common in respect of that tenement over *Mothersall* common, otherwise *Wybbenhall* heath, in the county of *Stafford*, the waste directed to be inclosed. Upon the first trial before *Lawrence, J.* at the *Stafford Lent* assizes 1810, the defendant offered in evidence, 1. An old grant to the priory of *Stone*, brought from the *Cottonian MSS.* in the *British Museum*. *Lawrence, J.* rejected this, first, on the authority of the case of *Michell v. Rabbetts*, still pending in the *Exchequer*, where a grant to the *Abbey of Glasstonbury* contained in a curious manuscript book entitled the *Secretum Abbatis*, preserved in the *Bodleian* library at *Oxford*, was rejected as not coming from a proper custody; and secondly, because these were entries made by the monastery of their own rights. Secondly, an old grant of common made by *John De Trussell* in 1342, to the priory of *Stone*, given by a friend of the plaintiff, not connected with the estate, to the plaintiff, as a curiosity. This the learned Judge rejected for the like reason, the possession of it not being sufficiently accounted for, nor connected with any one who had an interest in the land. It appeared that the commissioners had in the month of *August* preceding the trial, upon examination of evidence, allowed the claim of the defendant. There was much conflicting parol testimony on both sides as to the question whether the tenants of the tenement in right of which the claim was made, had been accustomed to turn out their cattle on the *locus in quo*, or on one of the two adjoining commons called *Normacott* common, and *Burlastone* common, all three of which, until lately, lay open to each other, and from either of those two the cattle put there strayed *pur cause de vicinage* into *Mothersall* common. The question went fully to the jury upon the contrary evidence, and the jury found a verdict for the defendant, confirming the decision of the commissioners.

*Lens, Serjt.*, having in *Easter* term 1810 obtained a rule *nis* for a new trial,

*Williams* and *Vaughan, Serjts.* now shewed cause. The defendant produced numerous witnesses who had seen the sheep

turned out from *Knight's* tenement upon *Mothersall* common, and the evidence was left to the jury, who are the proper tribunal to decide a doubtful point.

1810.

SWINNERTON

v.

Marquis of  
STAFFORD.

*Lens, contrà*, relied on the pointed evidence of one witness, who remembered many years since meeting the tenant of *Knight's* tenement driving his flock from the common, and hearing him assign as his reason for so doing, that the common was going to be driven, and that his sheep would be impounded; and also on a piece of evidence, that anciently there was no gate or opening directly leading from *Knight's* tenement to *Mothersall* common, until about 66 years since; when a wicket had been made through a fence of the farm abutting upon *Mothersall* common, through which the sheep used to be driven out to pasture there, and which wicket was stopped up about 45 years since, soon after a remonstrance made by the lord's bailiff against the turning out of sheep there by the tenants of *Knight's* tenement; also that at a later period the tenant of *Knight's* tenement had been long accustomed to turn out his sheep to common through a gate called the *Foldgate*, which led out upon *Normacott* common; but that the commoners of *Normacott* having made a fence to divide that common from *Mothersall*, this gate afterwards communicated only with a drift way, left without the fence, for access to *Knight's* tenement; upon which occasion the tenant of *Knight's* tenement complained that he now had no way to get out upon either of the commons, and in consequence he cut a gap through a corner of a wood in another part of the farm which abutted on *Normacott* common, and from that time forward suffered his sheep to stray out on the common through that gap, until *Normacott* common was finally allotted and inclosed by virtue of an act of parliament.

[ 93 ]

MANSFIELD, C. J. The point that weighs most in this case on the part of the application for a new trial, is, that it is a question involved in great doubt, great obscurity, and of great value; and the verdict in this case binds the right for ever. There are three commons of great extent, running for miles, all uninclosed; cattle wrongfully turned on, pass from one to another, and it is no one's business to turn them off. It is of little importance to the people of *Mothersall*, whether the cattle are immediately turned out on *Mothersall*, or on *Normacott*, whereon *Knight's* tenement certainly had common before the inclosure: and persons in such a state of things are naturally very inatten-

1810.  
 ———  
 SWINNERTON  
 v.  
 Marquis of  
 STAFFORD.

[ 94 ]

tive to the place where they are turned on. A lord of a manor, or his agent, might think it worth while, if he saw cattle improperly turned on, to order them off, in order to provide against any future contest, but the commoners have no interest; for whether the cattle are turned out on one common or the other, they would very soon find their way to that common where is the best pasture. There are several circumstances in this case which throw a doubt on the defendant's right of common. First, there was antiently no place through which cattle could be turned out from this farm on *Mothersall* common; this wicket being comparatively modern, and the opening through the wood quite recent. There was an opening to the road, but that led to *Normacott* common; and it would be a very singular circumstance if there was a right of common and no way to get at it. The evidence of the man, who heard at 10 years old the conversation between the lord's bailiff and the tenant, insisting on the latter stopping up the wicket, is in some degree confirmed by the wicket being now stopped up. And no reason other than the absence of common right is assigned to account for that circumstance. The observation, "Now we cannot get out on either common," is equivocal, but the last-mentioned circumstances and the making a way through the wood to *Normacott* common, certainly deserved consideration. And although the decision of the commissioners on the claim was made in *August*, and seven months elapsed before the time of the trial, yet that is not a very long time for the investigation of a matter, from its nature involved in so much doubt and obscurity: and since much pains seem to have been taken, and the subject-matter is of great value, and the inheritance is to be bound for ever by the verdict, and since it is very possible that more light may be thrown on it, it is better that it should go down to a further investigation. But the new trial must be had on payment of costs, and the person who applies for it would not be wise to pay the costs, and to try it again, unless he could throw more light on the subject. The Court does not decide that the present verdict is wrong; but for the reasons above-mentioned it may be more satisfactory that the case should undergo another inquiry.

Rule absolute upon payment of costs.

1810.

## COX v. BRAIN.

July 5.

**THIS** was an action for the rent or price of certain tithes. The declaration stated, that in consideration that the plaintiff would let to the defendant certain tithes arising upon a certain part or portion of a certain meadow called *Botley* meadow, for a certain space of time, to wit, one year, commencing from the 25th of *March* 1808, and would suffer the defendant to have and take the same for the said time, the defendant undertook to pay him therefore 4*l.*, to wit, 5*l.* immediately, and the residue on or before the 25th of *March* 1809: the plaintiff then averred, that he did let to the defendant the said tithes, and did permit and suffer him to have and take them for the said time. The second count stated, that the defendant was indebted to the plaintiff for certain tithes arising upon and from certain lands in the parish of *St. Thomas*, in the suburbs of the city of *Oxford*, and due and of right payable to the plaintiff, as proprietor thereof, by the plaintiff bargained and sold to the defendant, and by the defendant, according to that bargain and sale, had, enjoyed, and taken; and that the defendant undertook to pay. The next count was on a *quantum valebant*, for tithes of the like description. There were also counts for goods sold and delivered, and on an account stated. The defendant, as to all the said several supposed promises, except as to 15*l.*, *parcel of the several sums claimed*, pleaded that he did not undertake, and as to the 15*l.*, *parcel of the said several sums*, he pleaded a tender, and brought the same into court. He also pleaded a set-off. The plaintiff took issue on the tender and set-off. Upon the trial of this cause at the last *Oxford* Spring Assizes, before *Wood* B., it appeared that the plaintiff, who was lessee of the tithes in question, under *Christ-Church* in *Oxford*\*, on the 4th of *April* 1808, exposed them to be let or sold by auction; the conditions of the sale were, that the renter of the lots should pay immediately into the hands of the auctioneer 5*l.* as a deposit, as part of payment, and sign an agreement for payment of the remainder on or before the 25th of *March* 1809, if required. That the letting of the lots should commence from the 25th day of *March* then last past, and that the purchasers should give up their lots on the 25th day of *March* 1809. The defendant was declared the highest bidder for the first lot, which was the tithe of about 100 acres, more or less, of *Botley* meadow, and six acres of pasture land,

If the bargainee of tithes for one year underlet them to the several occupiers of the land, no notice to determine the underletting needs to be given by another bargainee of the same tithes for the following year.

A tender admits the contract and facts stated in the declaration: therefore where a count averred that in consideration that the plaintiff would let to the defendant certain tithes, the defendant agreed to pay 4*l.*; and that plaintiff did let the said tithes, and did permit the defendant to take them, a tender on all the counts generally precluded the defendant from shewing a legal interruption to his taking them, if any such interruption had subsisted.

[ \* 96 ]



1810.

---

 COX  
 v.  
 BRAIN.

[ 97 ]

land, at 41*l.*, and he paid into the hands of the auctioneer 5*l.* on account. The titheable land in *Botley* meadow was in the hands of nine occupiers, and the tithes had in the preceding year been let by the plaintiff on similar conditions, but at the rent of 23*l.* only, to *Chillingworth*, the occupier of the largest parcel of the land out of which they issued, and he had underlet to the several other occupiers the tithe of their respective lands. This circumstance was publicly stated at the time and place of the auction. The defendant having previously informed the occupiers of his intention, began to collect the tithes in kind; but after he had taken up the tithes of two or three occupiers, the rest of them refused to set out their tithes, alleging that they had received no notice to determine their compositions of the preceding year, but they offered the same sums, as compositions, which they had paid to *Chillingworth*: these however the defendant refused to accept. The defendant tendered to the plaintiff for the tithes the sum of 15*l.*, which was admitted to be a fully proportionate value for those tithes which he had collected in kind. *Wood, B.*, at the trial, was at first of opinion that the plaintiff could not recover, because he had not given the land-occupiers that notice to set out their tithes, which he thought was necessary to determine their pre-existing composition, and to put the defendant in possession of the tithes which he had contracted for; the plaintiff urged, on the authority of *Yate v. Willan*, 2 *East*, 128. and 1 *Term Rep.* 464. *Cox v. Parry*, that by the plea of tender, and payment of money into court upon all the counts, the defendant had admitted the special contract, and that nothing remained to be proved, but the amount of the damages he had sustained, which he contended was the difference between 15*l.* and 41*l.* The jury, however, under the direction of the learned Judge, found a verdict for the defendant, but liberty was reserved to the plaintiff to move to enter a verdict for the plaintiff.

Accordingly, in *Easter* term *Williams*, Serjt. moved, as well on the ground that the contract stood admitted by the payment into court, as also on the ground, that *Chillingworth*, whose interest was determined, could impart to his undertenants no greater estate than he himself possessed, and that therefore no notice to them was necessary. The Court granted a rule *nisi* on both points.

*Shepherd*, Serjt. in this term shewed cause. The plaintiff having tendered the value of so much of the tithe as he actually

had possession of, the plea of *non assumpsit* as to the residue is proved. The defendant went on collecting tithe until he was stopped by this composition being set up, and which was the default of the plaintiff, and all that he collected he paid for. [*Mansfield*, C. J. That would be a very good defence as to the residue beyond the 15*l.* upon the issue of *quantum valebant*, if the defendant had not admitted the special count.] And likewise upon the count for tithes sold, and delivered. And unless the tender be an admission of the cause of action, the defendant is clearly entitled to the verdict on the first count. The seller is bound to put the buyer in such a condition, that he may receive his tithe without dispute or trouble. [*Heath*, J. The seller is bound to warrant him against all lawful claims; no further.]

1810.

---

 COX  
v.  
BRAIN.

[ 98 ]

LAWRENCE, J. Could *Chillingworth* bind the estate longer than during his interest?

MANSFIELD, C. J. (stopping *Williams* and *Peckwell*, Serjts., who were prepared to support the rule,) How can you argue it? You have paid money into court generally; you now intend to apply it to the *quantum valebant*, and you insist on the sufficiency of that sum as your defence, saying that as to the special contract the plaintiff could not perform his part of it, and put you in possession of the tithes, as he had engaged to do. If you relied on that point, you had a plain way to proceed, by pleading *non assumpsit* to the first count, and paying the money into court on the *quantum valebant* only: but here, by inadvertency, you have by your tender admitted the special contract, and therefore you cannot deny it.

Rule absolute.

---

 COOPER v. BARBER.

[ 99 ]

July 5.

TRESPASS for breaking and entering four closes of the plaintiff, situate in the parish of *St. Bartholomew*, in the

No one can claim a prescription in his own land.

If an act immemorially done in the land of *A.* at each repetition produces an effect on the land of *B.*, which under the ordinary state and disposition of *B.*'s land occasions no perceptible injury, there is no ground to presume a grant from the ancestors of *B.* to the ancestors of *A.* of the right of doing that act.

Therefore if *B.* makes a new application and disposition of his land, of such a sort that the effect produced in the land of *B.* by the repetition of the act done in the land of *A.* becomes injurious to the property of *B.* under such new disposition of his land, *A.* is not authorized in repeating that act.

But if the effect produced on the land of *B.* by the act done in the land of *A.* had at all times occasioned a perceptible injury to *B.*'s property, there would have been sufficient ground to presume a grant from the ancestors of *B.* to the ancestors of *A.* of the right to do such act.

*A.* has immemorially had, for watering his lands, a channel through his own field, in a porous soil, through the banks of which channel, when filled, the water percolates and thence passes through the contiguous soil of *B.* below the surface, without producing visible injury. *B.* builds a new house in his land, below the level of his soil, in the current of the percolating water: *A.* cannot now justify filling his channel, if the percolating water thereby injures the house of *B.* *Per Lawrence*, J.

county

1810.

COOPER

v.

BARBER.

[ 100 ]

county of *Sussex*, and treading down and spoiling the grass, and subverting the soil; and, with sledges and other iron instruments, breaking down, prostrating, and destroying the hatches, penstocks, weirs, and dams of the plaintiff, there then erected, and throwing the materials into a certain watercourse, where they were lost. The defendant pleaded, first, not guilty. Secondly, as to the breaking and entering one of the closes, treading down a little of the grass, and there subverting the plaintiff's soil, and with sledges and other iron instruments breaking down, prostrating, and destroying the hatches, penstocks, weirs, and dams; that the defendant, long before, and at the said several times, when, &c. was lawfully possessed of a certain dwelling-house, with the appurtenances, in the parish of *St. Peter-the-Great*, otherwise the *Sub-deanry*, in the said county of *Sussex*, near to the said close in which, &c. and also near to a certain watercourse, running and flowing in and along the same close, and that the water of the said watercourse, before, and until the time of the obstruction thereof hereafter mentioned, had run and flowed, and had been used and accustomed to run and flow, and then and from thence until, and at the said several times when, &c. of right ought to have run and flowed, and still of right ought to run and flow, freely and without any undue obstruction or hindrance; and the defendant averred, that the said hatches, penstocks, weirs, and dams, before and at the said several times when, &c. had been, and were, unlawfully kept shut and fastened, and kept and continued to be shut and fastened, by the plaintiff, for a *great and unreasonable length of time*, so that the water of the said watercourse could not run and flow in its usual and accustomed manner, but was obstructed and kept back by the said hatches, penstocks, weirs and dams, insomuch that by reason thereof divers large quantities of water, which would otherwise have run and flowed away from the said dwelling-house, were prevented and hindered from so doing, and by means of the premises, ran, flowed and penetrated into the defendant's dwelling-house, &c.; for the purpose of abating and removing which obstruction and nuisance, the defendant justified the acts complained of. The third plea, after the same introduction as in the second, stated, that the plaintiff before and at the said several times when, &c. did *wrongfully and injuriously*, by and *with the hatches, penstocks, weirs, and dams* in the declaration mentioned, and *by wrongfully and injuriously keeping the same shut and fastened, cause and procure divers large quantities* of

*of water to accumulate and increase in and upon the said close in which, &c., and which, before and at the said time when, &c. ought to have run and flowed off and from the said close, in which, &c., and away from the dwelling-house of the defendant, and by reason whereof, divers large quantities of water, before and at the said several times when, &c. ran and flowed unto and into the same dwelling-house, &c. wherefore he justified the acts complained of. The fourth plea, after a similar introduction, averred, that the plaintiff, before and at the said time when, &c. wrongfully and injuriously kept and continued the said hatches, penstocks, weirs, and dams, shut, closed, and fastened in and across a certain watercourse in the said close in which, &c. and thereby caused and procured divers large quantities of water, before and at the said several times when &c. to arise, accumulate, and increase in and upon the said close in which &c., and by reason thereof divers large quantities of water, before and at the said several times when, &c. were hindered and prevented from running and flowing from the said last-mentioned dwelling-house of the defendant, and greatly overflowed and damaged the same, &c.; wherefore, &c. The plaintiff joined issue on the first plea; and in his replication to the second plea, admitted the defendant's possession of his house as therein described, but, protesting that the water of the said watercourse, before and until the time of the obstruction thereof in that plea mentioned, had not run and flowed, and had not been used and accustomed to run and flow, and then, and from thence until, and at the said several times when, &c. of right ought not to have run and flowed, and still of right ought not to run and flow freely, and without any undue obstruction or hindrance, he averred, that long before and at the said several times when, &c. Thomas Peckham Phipps Esq. was seised in his demesne as of fee, of and in the said close in which, &c. and of and in another close called the *Twenty Acres*, adjoining thereto, and situate in the said parish of *St. Bartholomew*, with their respective appurtenances; and prescribed in right of his estate of and in the said close called the *Twenty Acres*, for an immemorial right to stop up and dam, with hatches, penstocks, weirs, and dams, the water of the said watercourse in the said close in which, &c., for the purpose of turning the said water out of the said watercourse into, through, and over the said close in which, &c., in order to, and for the purpose of watering, meliorating, and improving the said other close called the *Twenty Acres*, every year, at all times of the year, as often as occasion hath required, as to the said close*

1810.

COOPER  
v.  
BARBER.

[ 101 ]

[ 102 ]

1810.

COOPER  
v.  
BARBER.

[ 103 ]

called the *Twenty Acres* with the appurtenances, belonging and appertaining, to wit, at the parish of *St. Bartholomew* aforesaid. He then averred, that *T. P. Phipps* demised both closes to the plaintiff, who afterwards, and before the said times when, &c., to wit, on the day last aforesaid, at the same parish, being a time when occasion required, did stop up and dam the water of the said watercourse, by then and there putting down and placing the said hatches, penstocks, weirs, and dams in the said close in which, &c., for the purpose of turning the water of the said watercourse out of the same, into, over, and through the said close in which, &c., in order to and for the purpose of watering, meliorating, and improving the said close called the *Twenty Acres*, and kept and continued the same, so put down and placed there, as the occasion then required, in exercise of the said right, as he therefore lawfully might, until the defendant, of his own wrong, at the said several times when, &c. committed the several trespasses, &c.; and concluded by traversing that the said *hatches, penstocks, weirs, and dams*, before and at the said several times when &c., had been and were *wrongfully shut and fastened, and kept*, and continued so shut and fastened, by the plaintiff, for a great and unreasonable length of time. To the third plea, the plaintiff, omitting the protestation, replied the same facts as in the replication to the second plea, and traversed that he did *wrongfully and injuriously, by and with the said hatches, dams, and weirs, and by wrongfully and injuriously keeping the same shut and fastened, cause and procure the said large quantities of water to accumulate and increase in and upon the said close in which, &c., and which before and at the said time when, &c. ought to have run and flowed off and from the said close in which, &c. to and away from the defendant's dwelling-house.* To the fourth plea the plaintiff replied in the same manner as to the third, and concluded with traversing that he *wrongfully and injuriously kept and continued the said hatches, penstocks, &c. shut, closed and fastened in and across the said watercourse, and thereby caused and procured divers large quantities of water to arise, accumulate, and increase in and upon the said close in which, &c.* The defendant in his rejoinder took issue on these several traverses. Upon the trial of this cause at *Horskam*, at the Spring Assizes 1810, for the county of *Sussex*, before *Heath, J.*, the case was this: The river *Lavant* flows from east to west, under the southern wall of the city of *Chichester*. At a certain place situate at the eastern end of the city, and lying to the east of the *locus in quo*, and of the turnpike road

road hereafter mentioned, part of the water is occasionally diverted, for the purpose of irrigating a meadow called *Grove's* meadow lying wholly to the east of, and abutting on the same turnpike road. This road issues from the south gate of the city, and goes from north to south. Many houses had been recently built without the gate both on the eastern and on the western sides of this road. On the western side stood the defendant's house, erected within six or seven years past, abutting on the road, and situate on a part of a close called *O'Brien's* garden, which extended about 180 yards in length, parallel to the road, and 50 in breadth. From the increase of the city, the frontage of this close towards the road had recently become building ground. The soil of the ground on which the defendant's house stood, had been excavated, and thereby lowered about two feet, a short time before the house was built. The defendant had also sunk, nearly four feet below the surface, the floor of his underground cellar and kitchen: at the time of building them he was warned that they would be subject to floods. On the western side of *O'Brien's* garden and abutting thereon, and on the south side of the river *Lavant*, lay a tract of meadow land called the *Deanery* farm, being all the property of one person, in trust for whom *Mr. Phipps* was seised thereof in fee, comprehending, amongst other lands, *Weller's* closes hereafter mentioned, and the two closes mentioned in the pleadings. An artificial cut, or main feeder, of indefinite, but of great and unquestioned antiquity, passed from the river *Lavant* at the north-eastern corner of this farm, through a part thereof occupied by *Weller*, along the eastern side of it, and contiguous and parallel to the western side of *O'Brien's* garden, flowing to the southward, for the space of 180 yards, within which distance the defendant's house was situate; so that this watercourse passed parallel to and beyond the back front of that house, being about 50 yards distant from it in the nearest point, and also parallel to the turnpike road. This feeder was prolonged northwards in a direct line beyond that length of the 180 yards for the purpose of watering other meadows occupied by *Weller*, not material to this case; but at the end of the 180 yards there was a penstock, or row of hatches, fixed across the feeder for the purpose of excluding the water from the prolonged part thereof, and causing it to flow over a weir or cascade situate in *Weller's* ground, on the western side of the stream, at that point, the altitude or perpendicular fall of which weir was two feet six inches. When these hatches were

1810.

COOPER  
v.  
BARNER.

[ 104 ]

1810.

COOPER

v.

BARBER.

[ 105 ]

were shut down, all the water fell over this weir, and at and from that point changed its course, and flowed from east to west, down a channel cut at right angles to the first-mentioned feeder, for the space of 200 yards, in the course of which distance it passed through a pond, situate about midway. At the western extremity of the 200 yards, another penstock, or row of hatches, was placed across the continuation of the watercourse, one post of the frame thereof being in a field occupied by *Weller*, situate on the southern side of the stream, and the other post of the frame thereof being placed in the plaintiff's close called the *Thirty Acres*, which lay on the northern side of that part of the stream: and at the same point commenced another feeder, the course of which diverged a little to the south-east, and passed into the plaintiff's close called the *Twenty Acres*, mentioned in the pleadings. When the hatches across the watercourse at this point were shut down, the water was penned back in the watercourse throughout the space that lay between that point and the pond, and was raised to the height of three feet five inches from the groundsill of the last-mentioned penstock, in consequence of which elevation it flowed along the last-mentioned feeder, and performed the office of irrigating the 20 acres: but when this penstock was so closed, it did not pen back the water further to the eastward than the pond before-mentioned, so that the shutting of this penstock did not in any way affect the current throughout the space that lay above the pond eastward, up to the weir, much less could it affect the height of the water in the 180 yards of feeder situate above the weir, at the times when the water flowed over the weir. The top of the last-mentioned penstock, too, was two feet three inches lower than the plane of the bed of the feeder in the 180 yards above the weir; which bed was, as nearly as might be, in the same level with the floor of the defendant's kitchen, and two feet lower than the bed of the *Lavant*; and the distance in a right line, drawn from this penstock to the defendant's house, was 317 yards; and the whole fall of the ground from the defendant's house to the same penstock, was five feet one inch. At the time mentioned in the pleadings, the first-mentioned penstock was partly shut down; and the second was entirely closed, for irrigating the 20 acres; and to increase the effect of the latter, some turfs and earth had been placed near the penstock on each bank, to raise the head (which the learned Judge thought was material); so that the water had risen to the height of

[ 106 ]

of a foot above the top of the last-mentioned penstock itself, and flowed over it: it was a wet season, and the stream was very copious. The banks of these feeders, and the soil of the fields in question, and of all the adjacent valley, consist of a porous gravel, which is easily percolated by water. And the most judicious witnesses who were called, stated that the water in the defendant's premises was that which soaked through the bank of the nearest watercourse, namely, the 180 yards of feeder parallel to the back of his house. The defendant found water seven inches deep in the kitchen and cellar of his house, and conceiving that it proceeded from the stream which was penned back for watering these meadows, he went with his servants in search of the nuisances, in order to abate them. He first came to the penstock nearest to his house, situated in *Weller's* meadow, at the southern extremity of the 180 yards, where he removed two boards, which, as they were before placed, had the effect of raising the water in the 180 yards' length of the first main feeder. He then proceeded to the second penstock, at the western end of the 200 yards, which he broke down, and thereby drew the water off from the feeder of the *Twenty Acres*, and let it pass off westward down the lower channel. The water had at that time been penned on the meadows only three days; a month or six weeks was the time during which the water had usually been kept on the land in former years. From the time of doing these two acts the water in the defendant's house sunk rapidly, and the floor became dry. But it appeared that about a week afterwards, the *Lavant* being greatly increased by the melting of the snows, which occasioned a general flood, the defendant's cellar became full of water again, and continued so for many weeks, though the penstock secondly mentioned had not, during that period, been shut down, nor even repaired. The destruction of this, which was the plaintiff's penstock, was the act for which the plaintiff intended to claim a compensation by this action, but the parties went to trial upon the issues which have been stated. On the part of the plaintiff it was attempted to shew, that the water in the defendant's house proceeded, not from the watercourse, but either from land springs, which were proved to exist near the spot, or from the irrigation of *Grove's* meadow, which lay, as before mentioned, on the eastern and opposite side of the road, on a higher level than the defendant's house, or from springs which rose in that meadow: but the defendant clearly disproved the first of these pretences, by proving

1810.

COOPER  
v.  
BARNES.

[ 107 ]



1810.  
 ———  
 COOPER  
 v.  
 BARBER.

[ 108 ]

proving that the water left his house, almost instantaneously, when he had done the acts complained of; and he shewed the futility of the others by the testimony of an intelligent surveyor, who lived directly opposite to the defendant, on the eastern side of the road, and who proved, that when *Grove's* meadow was irrigated, his own house, and those adjoining on the eastern side of the road, which were contiguous to the meadow, were incommoded by water coming into their lower apartments; and that too at times when the defendant's house, and the other houses on the eastern side of the road, were quite free from water; and that, *vice versa*, at the time of the injury complained of, and at other times, when the defendant's house, and other houses on the western side of the road were flooded, his own and the other houses on the eastern side were dry. The plaintiff proved that the lower penstock at the extremity of the 200 yards had been erected 30 or 40 years since, that it had been used without interruption for 30 years, and that a penstock had been remembered there for 70 years. On the other hand, the defendant relied on a supposed inconsistency in the accounts given by two different witnesses for the plaintiff of the elevation to which the lower penstock raised the water at different periods of time; one of whom stated that 40 years since it raised the relative height (in the watercourse) of the water between the pond and the penstock 18 or 20 inches, which sufficed for watering the *Twenty Acres*, and penned back the water as far as the pond; whereas, another stated, that the total fall at the lower penstock was three feet five inches; and the defendant contended that this evidence proved that the lower penstock itself had been recently enhanced: in order to combat the prescription, he also proved by several witnesses that inhabitants of the city of *Chichester*, which is much subject to floods from the *Lavant*, had, at various times, abated various penstocks, and other erections which they deemed nuisances; among others the penstocks in question. Upon these issues and evidence, *Heath, J.* directed the jury, that in case they should be of opinion that the flooding of the defendant's cellar was occasioned by the penning of the water, the question would be whether the penstock had been properly kept shut, or whether it had been shut down an unreasonable length of time, so as to occasion an injurious annoyance to the defendant's house. On the preliminary question, the evidence of the surveyors was, as usual, contradictory, but there was a fact worth a great many speculations: the sub-

siding

siding of the water left no doubt upon the point. If the plaintiff had possessed an uninterrupted right to raise the penstock to a certain height, it would not derogate from that right that the defendant had thought proper to build a house, and make his kitchen deep in the ground: but the plaintiff's enjoyment had not been very peaceable; for whenever the neighbouring inhabitants felt any inconvenience, they went and pulled down the penstock; from which, and from the different heights assigned to the penstock, by different witnesses, he thought there was conclusive evidence that the penstock had been enhanced of late years from one foot eight inches, to three feet five inches; and, if the jury should be of that opinion, there was sufficient ground to find a verdict for the defendant, which they accordingly did.

*Shepherd*, Serjt., in *Easter* term, moved for a rule *nisi* to set aside the verdict and have a new trial: he observed that the defendant's rejoinder did not deny the plaintiff's right to the penstock. It was proved that at the time of the injury the water ran to the penstock at the same height, and in the same manner, and the levels of the bed of the watercourse behind the defendant's house, and of the penstocks, were the same, as, to the memory of all the witnesses, had ever been the case; the top of the lower penstock was two feet three inches lower than the foot of the cascade which flowed over the weir, consequently it was impossible that that penstock should make the water flow over the banks of the watercourse into the defendant's house. [*Heath*, J. observed that it was not alleged that the injury was sustained by the water overflowing the banks, but by its oozing through them, and through a porous and gravelly soil.] Even supposing the lower penstock to have been the cause of the mischief, it was of immemorial antiquity, and the house had been built only within six or seven years past: the defendant, therefore, was not justified in demolishing the penstock in right of his house; and even if the owner of the house had before this time, since its erection, destroyed the penstock, he would not thereby establish his right in destruction of the plaintiff's prescription.

*LAWRENCE*, J. You claim a prescriptive right to erect the penstock; now the penstock is in the plaintiff's lessor's own grounds, and he may pen the water there as he will, until he does a damage to his neighbour, which may not have happened till now. Is it not law that you must so use your own as not to prejudice your neighbour? And until you prejudice your neighbour by penning the water, you do that which you have a right

1810.

COOPER  
v.  
BARBER.

[ 109 ]

[ 110 ]

1810.  
—  
COOPER  
v.  
BARBER.

right to do; but where you begin to injure your neighbour, there the right terminates. If there had been an ancient house, into which you had, by your penstock, immemorially caused the water to flow, without being encountered by any obstruction, it would have been evidence of a grant; but here is no such evidence.

MANSFIELD, C. J. Upon the second and third traverses, which are hardly distinguishable from each other, and which go to the defendant's right of erecting any penstock at all, the verdict certainly ought to have been for the plaintiff; for it is plain that the cut must have at some time been made out of the river for the benefit of the land, which might anciently have belonged to the same person; but without penstocks he could not have the benefit of the cut: but, according to the terms of these two issues, the verdict precludes the plaintiff from having any penstock at all.

LAWRENCE, J. The defendant does not contend that the plaintiff has no right to any penstock at all, but that he has no right to erect a penstock which shall cause the water to flood his house.

CHAMBER, J. The defendant's rejoinder should have pointed out, as a justification, some enhancement of the nuisance: now it does not. And the interruption shewn to the exercise of the right occurred 50 years back.

[ 111 ] The Court recommended to the parties to refer the whole matter to arbitration, and desired it might stand over to give time for an arrangement, but the defendant not consenting, on a subsequent day, they granted a rule *nisi* for a new trial.

*Best*, Serjt. now shewed cause against this rule. The defendant intended, by these issues, to dispute the plaintiff's right to erect any penstock at all, and the jury, upon evidence, of which they are the proper judges, have found that point for him.

MANSFIELD, C. J. observed that the two last issues were too loosely worded to try that right, for they had put no fact in issue: they alleged that the plaintiff had shut the hatches wrongfully and injuriously; but they did not shew whether it was injuriously done, because the plaintiff had no right to shut them at all, or whether it was, because they were kept shut at improper and unreasonable times, or for an unreasonable length of time, as alleged in the first issue.

HEATH, J. observed that the first issue, on the reasonableness of the time, had admitted the plaintiff's right to shut them for

for some time; and that, in fact, there was no evidence of their having been shut an unreasonable length of time, to support the verdict on the first issue.

Rule absolute for a new trial.

*Best* then prayed that the defendant might be permitted to amend his pleadings, which the Court reserved for future consideration; still recommending to the parties to settle the whole matter by arbitration.

The case never again came before the Court.

1810.

COOPER  
v.  
BARBER.

REX v. DAVEY, in the Cause of HACKET v. MEWES and  
Another. [ 112 ]  
July 6.

THE plaintiff having issued a writ of *feri facias* against the effects of the defendant, and the levy having been frustrated by the violence of *George Davey* and *Thomas Davey*, an attachment was obtained against them, whereupon they put in bail to the attachment, and entered into recognizances in 50*l.* each, to the intent that they should appear and answer interrogatories, which the plaintiff caused to be filed, but they never took office copies thereof, nor took any steps to save the forfeiture of their recognizances; and they had since absconded, and the several recognizances were forfeited. The recognizances were put on record; and the bail, on the plaintiff's making application, had refused to make him any compensation.

The Court of Common Pleas cannot apply the forfeited penalties of the recognizances of bail to attachments, to the discharge of the debt of the defendant in the original action, and costs.

*Rough, Serjt.* moved that the bail of *Davey* might pay the plaintiff the amount of the levy indorsed on the *feri facias*, together with the costs of the attachment and subsequent proceedings, and the costs of this application, not exceeding the amount of their recognizances.

MANSFIELD, C. J. This is a debt due to the King, and I do not see how we can help you.

HEATH, J. The recognizances of bail upon attachments are regularly estreated, and, of course, will have the same consequences as any other recognizances estreated in the Court of Exchequer. You may apply to that Court to try if you can obtain any assistance from them: but we cannot delay the estreating of the recognizances.

Rule refused.

1810.

July 7.

## HUNT, Administrator of CAMPBELL, v. STEVENS and Another.

Whether a delivery of household goods was complete, the upholsterer still having a servant in the vendee's house, where the goods were, and the vendee not having yet taken any actual possession, *quære*.

If an administrator shews that he sues for a greater value than is covered by the *ad valorem* stamp of his letters of administration, he shews his administration to be void, and cannot recover.

Although he sues for a doubtful claim.

He must prove his administration, for that constitutes his title to recover.

And it will not suffice to sue out new letters of administration on a larger stamp after he has

[ 114 ]  
obtained judgment.

THE plaintiff declared in trover, as administrator, for certain household furniture, upon a conversion alleged to have been made after the decease of the intestate. Upon the trial of this cause at the sittings at *Westminster* after *Hilary* term 1810, before *Mansfield*, C. J., it appeared that the deceased employed the defendants, who were upholsterers, to furnish a house which he had taken; and they had accordingly, about a fortnight before his death, sent in goods to the amount of, at least, 1800*l*.: they placed a man in the house, who indeed stated in evidence, that, without an order from the defendants, he should not have permitted the deceased to take possession of the furniture; but the purpose for which he was placed there was the superintending repairs and disposing the furniture. The deceased had effected an insurance on the furniture to the amount of 700*l*., the work was completed, and the deceased was preparing to go on the 5th of *February* to inhabit the house, but on the 3d of *February* he died. In the night of the 3d the plaintiff, who was then a judgment creditor, and also had an assignment of the goods in question, but had never obtained an inventory of them, endeavoured to possess himself of these effects under an execution, but the defendants privately conveyed them away in the course of the same night. The plaintiff then took out letters of administration to the deceased upon a stamp for a value not exceeding 1000*l*., as appeared by a copy of the bond given to the ordinary, entered in the books of the proper officer of the Prerogative Court, the letters of administration themselves being not produced. It was objected on the part of the defendant, that the stamp was of too low a denomination. *Mansfield*, C. J. left it to the jury whether, before *Campbell's* death, there had ever been a complete delivery of the goods, such as to put them wholly into the possession of *Campbell*, and out of the power of the defendants, or not, and the jury, thinking that there had not, found a verdict for the defendants.

*Vaughan*, Serjt. having in *Easter* term last obtained a rule *nisi* for a new trial,

*Shepherd* and *Lens*, Serjts. now shewed cause. They contended that, upon the evidence, the delivery was not complete, the

the defendant's servant still continuing in possession; and his custody of the goods was at least equivocal, and the deceased never himself had the possession. [*Lawrence*, J. suggested the case of a loss by fire.] In many cases goods are at the risk of the vendee, to insure from fire, although the right of stoppage *in transitu* remains with the vendor. Next, as to the title of the plaintiff; it is true that administration is sometimes taken out for too small a sum; but if that happens in consequence of greater property being afterwards discovered, the administration is recalled, and other letters are granted with a stamp of a larger denomination; but unless this is done, the smaller stamp gives no validity to the grant, which may be inferred from the statute 48 Geo. 3. c. 149. s. 35.: for that act expressly provides, that a probate or administration shall be valid for the purpose of transferring trust property, notwithstanding the trust property shall not be included in the amount for which the probate or administration is granted: whence it seems to follow that, since this act, if the administration stamp be too small to cover the whole amount of the beneficial property, the grant is void. Indeed, if this were not so, a person taking out administration for 1000*l.*, might administer effects to the value of 100,000*l.*

*Best* and *Vaughan*, Serjts. *contra*. As to the last objection, since the plaintiff styles himself administrator in the declaration, if the defendants meant to have contested that fact, they should have denied it by the plea. [*Lawrence*, J. The plaintiff declares as administrator, and upon a conversion in his own time: it has been decided, that the styling himself administrator is of no avail, he must prove himself to be such; and the question is raised by the plea of not guilty in trover, it goes to the foundation of the plaintiff's title, and the want of administration need not therefore be specially pleaded.] The temporal courts are bound to recognize this administration, which is the act of the spiritual court, as long as it remains unrepealed. But the question does not arise upon the facts of the present case, for the only proof of the amount of the stamp was by the secondary evidence of the officer's books, which ought not to have been received. In such a case as this, too, where the property is not in the actual possession, although it is in the legal possession of the administrator, he cannot know the exact value, and he is not bound to pay the duty on speculation, and

1810.

HUNT  
v.  
STEVENS

[ 115 ]

1810.

HUNT

v.

STEVENS.

to look to the possibility of recovering every desperate debt and hopeless claim. It will be sufficient to satisfy the act if, after this claim is established, the plaintiff takes out a new administration upon a stamp of adequate amount. The act expressly provides, that residuary legatees may come in from day to day, to pay the duty on a residuary legacy, and the same reason holds with regard to an administrator; for at first he cannot foresee the full amount of the property. He was proceeding to discuss the merits, but was stopped by

[ 116 ]

*The Court*, who declared that he could not arrive at the consideration of them, the preliminary objection being decisive. The act of 48 Geo. 3. c. 140. s. 8., for the purpose of enforcing the payment of the stamp duties, re-enacts all the provisions of former acts; and one of those regulations, as to the consequences of not obtaining the requisite stamps, is, that no instrument, not properly stamped, shall be given in evidence. The old statute of 9 & 10 W. 3. c. 25. s. 19. 39. first contains the clause containing this prohibition, and it has been continued through all succeeding acts. The objection raised to the secondary evidence cannot avail the plaintiff, for unless that evidence is admitted, there is no proof in the cause of any administration granted to him; and on this the foundation of his title rests. The act makes no allowance for loss by debts; administration must be taken out for the full amount. According to the plaintiff's argument, if the plaintiff had taken out administration to the amount of 10*l.* only, he could equally recover in this action, as now that he has taken it for 1000*l.*, and the consequence to the revenue would be most pernicious; for if he were to recover property to the amount of 20,000*l.*, the administration would still stand good. The especial provision made for the payment of an increased duty by residuary legatees, shews that, without such a provision, the practice extended for cannot prevail.

Rule discharged(a).

(a) *Chambre, J.* was absent this day, owing to indisposition.

1810.

## DUFRESNE V. HUTCHINSON.

July 7. (a)

**T**HIS was an action of trover brought by the plaintiff, who was a manufacturer at *Leeds*, against the defendant, who was a broker in *London*, to recover the value of certain cloths which had been consigned by the plaintiff to the defendant for sale upon commission. Upon the trial of this cause at *Guildhall*, at the sittings after last *Hilary* term, before *Mansfield*, C. J., it appeared that the plaintiff had delivered the goods to the defendant, valued at the invoice price of 972*l.* 1*s.* 2*d.*, with positive instructions not to sell even at one quarter *per cent.* below that price. The defendant having advanced money to the plaintiff on the credit of these goods, and finding himself unable to dispose of them at the price prescribed, became impatient, and placed the goods in the hands of certain other factors, named *Bowdler* and *Morley*, to be sold at all events for what they would produce, on the sole account of himself the defendant, he having a lien on the goods for the advances he had made. *Morley*, being called as a witness, declared that he would not have paid over the proceeds to any person except the defendant. It appeared, however, that the plaintiff ultimately knew of the delivery of the goods to *Bowdler* and *Morley*, and consented that they should sell them at a price seven and a half *per cent.* below the invoice price fixed; to which they answered, that so small a reduction was merely nugatory; but it did not appear that the plaintiff consented to any further diminution of the price. *Bowdler* and *Morley* sold the goods for somewhat more than 600*l.*, being the best price they could obtain. The plaintiff had sued out a writ in a joint action against *Bowdler* and *Morley* and the defendant; which he dropped upon receiving from *Bowdler* and *Morley* alone the sum of 200*l.*, and then commenced the present action against the defendant. The jury found a verdict for the plaintiff for the amount of the original invoice price, deducting therefrom the sums which the defendant had advanced to the plaintiff, and the seven and a half *per cent.* which the plaintiff had consented to abate.

*Cockell*, Serjt. had in the last term obtained a rule *nisi* for

(a) *Chambre*, J. was absent this day, on account of indisposition.

entering

If a broker, being authorized to sell goods for a certain price, sells them at an inferior price, he is not liable in trover for amount of the goods.

The proper remedy is by an action upon the case.

If the plaintiff in an action commenced against several tort-fensors, accept of a sum of money from one of them and drop that action, *semble* that he cannot sue the others.

[ 118 ]



1810.  
 ———  
 DUFRESNE  
 v.  
 HUTCHINSON.

entering a nonsuit, or a verdict for nominal damages only, upon two grounds. First, that as the goods lawfully came into the hands of the defendant to be sold on commission, if he, either in person or by his agents, improperly and improvidently sold them, the plaintiff's remedy was by an action upon the case, not by an action of trover: and secondly, that supposing trover would lie, the sale actually made had furnished the true criterion of the real value of the goods, which was the proper measure of damages; and since the plaintiff had consented that *Bowdler* and *Morley* should sell, and repay the defendant the advances he had made, the plaintiff was entitled to recover only the residue of the actual produce that remained after making that payment.

[ 119 ] *Best*, Serjt. now shewed cause. He contended, upon the authority of *Syeds v. Hay*, 4 T. R. 264., that where a bailee disposes of goods in a manner contrary to the directions of the bailor, as here, trover lies, and that the parting with the goods at a less price than the plaintiff had fixed on them, was a conversion by the defendant. He also cited the case of *Yowle v. Harbottle*, *Peake's N. P. Cases*, 49., where Lord *Kenyon*, C. J. held, that if a carrier delivers goods to a stranger, he thereby becomes an actor, and is guilty of a conversion, for which trover lies. The defendant in the present case was an actor, for *Bowdler* and *Morley* held themselves responsible to him only; and the money which they paid to the plaintiff was not received by him in affirmance of their act, but was paid by way of buying off the action commenced against them for their misfeasance.

*Cockell*, *contra*, was stopped by the Court.

MANSFIELD, C. J. observed, that it clearly appeared that the plaintiff had authorized *Bowdler* and *Morley* to sell at a price not more than seven and a half *per cent.* below the invoice price. He could not therefore maintain trover against the defendant for the goods sold by them, whom the plaintiff had constituted his own brokers. The plaintiff had also brought an action against them, and received 200*l.* in compensation for the injury of which he complained.

LAWRENCE, J. Since the plaintiff sued out a writ against *Bowdler* and *Morley* jointly with the defendant, it must be taken that he meant to declare in such a form of action in which he could recover: it must be presumed, therefore, that he would declare for money had and received, not in trover; for

for the plaintiff had given to *Bowdler* and *Morley* an authority to sell, and therefore could not recover against them in trover. But by declaring for money had and received, the plaintiff would affirm the sale: besides, if trover had been the right form of action, it would be a question whether the discharge made to one tort-feasor would not be a release to all: if it were otherwise, the plaintiff might get paid by each defendant to the whole amount of the injury sustained.

Rule absolute to enter a nonsuit.

1810.

DUFRESNE  
v.  
HUTCHINSON.

DOE, on the Demise of DAVID WHAYMAN and  
Another, v. CHAPLIN.

[ 120 ]  
July 11.

THIS was an ejectment brought on the several demises, amongst others, of, 1. *David Whayman, John Hunt, William Read*, 2. *David Whayman*, 3. *John Hunt*, 4. *William Read*, 5. *George Beedon, David Whayman, William Read, John Hunt*, to recover the possession of 32 acres of marsh land in the parish of *Sudborne*, in the county of *Suffolk*. At the *Bury* Lent assizes 1810, before *Grose, J.* it appeared, that by copy of court-roll, dated the 20th *July* 1784, upon the surrender of *Robert Brady*, these lands, which were copyhold, were granted to *George Woolnough, George Beedon, David Whayman, William Read*, and *John Hunt*, their heirs and assigns, and the heirs and assigns of the survivor of them, upon certain charitable trusts, devised by the will of *Thomas Grimbold*, deceased. *Woolnough* was dead. In 1796, the four surviving trustees demised to *John Ablett* for three years, from the 5th of *January* 1797, at the rent of 1*l.* 10*s.* *per acre*, during which term *Ablett* died, and upon his death the defendant, who was his executor, entered, and continued tenant under the same rent, until the 27th *June* 1808, when the defendant was served with a notice from "each and every of the undersigned, to quit, at *Old Christmas-day* then next ensuing, or at the time when his current year's occupation should expire, the premises which he then held as tenant to them, or some one of them." Signed by the churchwardens and overseers of the parish of *Sudborne*, (who had usually received the rents,) and by *David Whayman, John Hunt*, and *William Read*, trustees of the said land. The defendant had entered into the ordinary consent rule, confessing ouster, as well as lease and entry. The plaintiff also relied on the circumstance,

If four joint-tenants jointly demise from year to year, such of them as give notice to quit may recover their several shares in ejectment on their several demises.

1810.  
 —  
 DOE,  
 Lessee of  
 WHAYMAN  
 and Others,  
 v.  
 CHAPLIN.  
 [ \*121 ]

cumstance, of which he gave evidence, that the land was worth more rent than at present was given; whence he inferred, \*that it was for the benefit of all the joint-tenants to determine the tenancy, that they might let the land at a higher rent; and he contended that a joint-tenant can bind his companion by an act beneficial to him.

For the defendant it was objected, that one of the joint lessors, *George Beeton*, had not signed the notice to quit: his name was used in the declaration; it was also proved that he had given notice to his co-lessors, that he disapproved of the ejectment, and of the notice to quit. For the plaintiff it was answered, that there being separate demises, the notice and declaration were good, if not for the whole of the land, at least for the separate shares and interests of those trustees who had signed the notice. The jury, however, under the direction of *Grose, J.*, who reserved the point, found a verdict for the defendant.

*Shepherd*, Serjt. having in *Easter* term obtained a rule *nisi* to set aside the verdict and have a new trial,

*Sellon*, Serjt. in this term shewed cause. The question cannot arise in this case, how far one joint-tenant may be bound by the beneficial act of his companion, done without his privity; for he expressly dissented from that act. In the case of *Right, on the Demise of Fisher and Others, v. Cuthell*, 5 East, 491. it was held by Lord *Ellenborough*, C. J. and *Lawrence, J.*, that even the ratification by a joint-tenant, of a notice to quit given by his companions, would not make it good; for that the notice must be such an one, on which the tenant can rely and act with certainty at the moment of receiving it. The tenant could not act upon this notice given by three only.

*Shepherd, contra*, distinguished this case from *Right v. Cuthell*, by observing that there the express terms of the condition required the concurrence of all the executors. Here, if there were no count but on the joint demise of the four, there might be some colour for the objection; but there are separate demises by each of them, and joint-tenants may demise their shares severally. *Litt. s. 189*. If so, the notice of each will determine the share of each.

The Court (a) at first inclined to lay much stress upon the inconvenience that would ensue to the tenant, if, out of four

(a) *Chambre, J.* was absent this day owing to indisposition.

joint lessors, a part were to give him notice to quit at such a time as to deprive him of the opportunity of giving notice to the residue of his lessors of his intention to quit the whole at the same time. In that case he might be compelled to become for the next year joint-tenant with some of his lessors; therefore this contract must be considered as made by the tenant on the one part with four lessors on the other part, who must all unite to determine the contract. But they afterwards desired that the matter might be further spoken to. Accordingly the point was again spoken to by *Sellon* and *Shepherd*, and the Court having taken time to consider,

MANSFIELD, C. J. now delivered their judgment.

There was in this case a verdict for the defendant, because the notice was supposed to be not sufficient, being signed by three instead of four. The lessors are joint-tenants: the question is, whether they or any of them have a right to recover any or what part of the premises? It is necessary to inquire what estate they had, and what powers belong to it. As joint-tenants, each had a right to demise his share. It would follow, that each had a right to put an end to that demise. It cannot depend on another, when that demise shall end. *Littl. sect. 288. Lord Coke's Commentary, 186. a.* To divers purposes each hath but a right to a moiety, as to enfeoff, give, or demise; and where all join in a feoffment, every of them, in judgment of law, gives but his part. If both make a feoffment in fee upon condition, and that for breach thereof, one of them shall enter into the whole, yet he shall enter but into a moiety, because that no more in judgment of law passed from him. This shews that although the title, as well as the estate, be undivided, yet each hath so much as his portion is; and when they all join in a feoffment, each conveys only his part. So, if all join in a demise, in law, it is the demise by each of his portion. If so, and if each demises only his own share, it cannot be said, that he cannot put an end to that demise, whether his companion join with him or not. Therefore the lessors of the plaintiff have a right to recover three parts.

*Sellon* then moved that the rule might be amended by striking out the confession of ouster, as this decision left his client tenant in common of the other fourth part.

LAWRENCE, J. You are contending the rest have no right to enter at all. Is not that an actual ouster? But if you can make

1810.

DOE,  
Lessee of  
WHATMAN  
and Others,  
v.  
CHAPLIN.

[ 127 ]

1810. make any thing of it, you had better apply to a judge chambers.

DOE,  
Lessee of  
WHAYMAN  
and Others,  
v.  
CHAPLIN.

Rule absolute for a new

July 7.

WILLIAMS v. BURGESS.

Notice of action against a customhouse officer for breaking the plaintiff's dwelling-house in C. street, in the

[ 128 ]  
parish of G. is not a sufficient notice of the plaintiff's place of abode, within the stat. 23 G. 3. c. 70. s. 30. and 24 G. 3. sess. 2. c. 47. s. 35.

In a penal action, if a parish is styled by its popular and well-known name, it is well enough, though that is not the name of consecration.

**T**RESPASS against the defendant, a custom-house officer breaking and entering the plaintiff's dwelling-house: the trial, at the *Westminster* sittings after *Easter* term 1 before *Lawrence*, J., it appeared that the defendant entered search for run goods, but found none: after staying about minutes (without doing any damage) he went away. The statute 24 G. 3. sess. 2. c. 47. s. 35. extends to officers of the customs all the protections given to officers of the excise by 23 G. 3. c. 70. s. 30., which enacts, that no writ shall be brought against such officer for any thing done in the execution of his office, until one calendar month after notice in writing which notice shall be clearly and explicitly contained the of action, the name and place of abode of the person who brings such action, and the name and place of abode of the plaintiff's attorney or agent. And by s. 32. no plaintiff shall be permitted to produce any evidence of the cause of such action, except such as shall be contained in the notice. In this case the notice produced was dated on the 29th of *December* and expressed the plaintiff's intention to sue, because the defendant had, on the 22d of *November*, broken open the dwelling-house and warehouse of *Thomas Williams*, in *Cable-street*, parish of *St. George's* in the *East*, without otherwise stating the place of abode of the plaintiff. *Shepherd*, Serjt., for the defendant, contended that this notice was insufficient, on two grounds: first, because the plaintiff's place of abode was not explicitly stated; secondly, because the cause of action to be proved was inconsistent with this notice, must be an act done in the parish of *St. George's* in the *East*; and there is no such parish in the *Westminster*. *Best*, Serjt., *contra*. 1. The dwelling-house of the defendant is his place of abode. This is an explicit statement in the notice that he dwells there. 2. "In an action of debt on a penal statute 3 H. 8. c. 11. s. 2. against *Dr. Leigh*, for practising phy

the parish of *St. George's* in the *East*, within seven miles of the city of *London*, the act of consecration being produced, it appeared that the name of the parish was *St. George's* in the county of *Middlesex*; and *Lee*, C. J. held it was well enough, for it was more generally known by the name of *St. George's* in the *East*, than by the name of *St. George's* in the county of *Middlesex*." [*Lawrence*, J. It can only be collected from the notice, and that but by inference, that the defendant's place of abode was in *Cable-street* on the 22d of *November*, when the cause of action arose, but the intent of the notice is, that the defendant may know where to find the plaintiff, in order to tender him amends, on the receipt of the notice; and how does it appear that the plaintiff continued to reside there on the 29th of *December*, when the notice was given?] As to the other point, he thought the name of the parish was stated with sufficient correctness, as it could not mislead. He permitted the cause to proceed, reserving the first point; subject to which, the jury found a verdict for the plaintiff.

*Shepherd* having in this term obtained a rule *nisi* to enter a verdict for the defendant in pursuance of the statute,

*Best* and *Frere*, Serjts., shewed cause.

*MANSFIELD*, C. J. A man may have two houses; but the notice must be served at that which is his place of abode.

The rest of the Court concurring,

Rule absolute.

---



---

BRIDGES v. BERRY.

1810.

WILLIAMS  
vs  
BURGESS.

[ 129 ]

[ 130 ]

July 9.

THIS action was brought upon two bills of exchange; one for 117*l.* 11*s.* 2*d.*, drawn on the 26th of *October* 1809, by the defendant, at two months' date, upon one *Ivory*; payable to his own order: the other for 119*l.*, drawn on the 17th *July* 1809, at three months' date, by one *Bax*, upon the defendant, and accepted by him. At the trial of this cause, at the *Middlesex* sittings in the present term, before *Mansfield*, C. J., it appeared, that a few days after the bill accepted by the defendant had become due, the plaintiff applied to him for payment, and that the defendant, confessing his inability then to pay, requested

The defendant, being unable to pay a bill when due, which he had accepted, obtained time, and indorsed to the plaintiff as a security a bill drawn by himself to his own order, which, when due, was dishonoured by the drawee, but the holder

omitted to give the defendant notice: held that by this laches the defendant was not only discharged as indorser of the one bill, but also as acceptor of the other.

further

1810.  
 —  
 BRIDGES  
 v.  
 BRAY.

further time, and indorsed to the plaintiff, and lodged in his hands, the bill for 117*l.* 11*s.* 2*d.* as a security; and paid in cash the difference, with the interest and costs of the first bill. When this bill for 117*l.* 11*s.* 2*d.* became due, it was paid by the acceptor; but no notice of the non-payment was given to the defendant, the drawer of that bill. It was admitted on the part of the plaintiff, that the defendant was discharged from the latter bill; but it was insisted that he continued liable on the first bill for 119*l.* On the part of the defendant it was contended, that he was also discharged from his liability to pay that bill; and the Judge being of that opinion, nonsuited the plaintiff, giving leave to his counsel to move to set aside the nonsuit.

[ 131 ]

*Vaughan*, Serjt. now moved for a rule to shew cause why the nonsuit should not be set aside, and a verdict entered for the plaintiff for 119*l.* He contended, that although the plaintiff, by not giving notice of the non-payment by the acceptor of the bill for 117*l.* 11*s.* 2*d.*, had lost his remedy thereon against the defendant, still that circumstance did not preclude him from suing him upon the first bill; and he cited the case of *Watson v. Furber*, 8 *East*, 242., where it was held, that in an action by a guarantee for money paid on account of one who had bought goods, and who, having accepted a bill for the purchase, had failed to pay it when due; the guarantee was not obliged to give evidence of any demand of payment made on the defendant as acceptor of the bill. But the Court held that the case did not apply. Here the defendant had first given a bill, on which he was liable as acceptor; and then, for a security, he delivered to the plaintiff a bill, on which the defendant had a right to sue other persons; the plaintiff, by not giving him due notice of the dishonour of the last-mentioned bill, put it out of his power to recover what was due thereon, and having so done, he shall not be permitted to resort to the first bill.

*Shepherd* Serjt. for the defendant.

Rule re

HINC

1810.

## HINCKLEY v. WALTON.

July 9.

**T**HIS was an action on a policy of assurance on goods, upon the ship *Providence*, at and from *London* to *Madeira*, at the rate of six guineas *per cent.*, to return *3l. per cent.* for *East* or *West India* convoy and arrival, with liberty in that voyage to proceed and sail to, and to touch and stay at any ports and places whatsoever, particularly to seek, join, and exchange convoys, load and unload goods, without being deemed a deviation. A licence had been obtained, on the 12th of *January*, from the Admiralty, for the ship *Providence* of *London*, *Smith*, master, burden 100 tons, armed with six carriage guns and manned with 18 men and boys, to sail from *London* without convoy, provided she should be armed and manned in the manner above mentioned. She had her full complement on board in the port of *London*, but discharged five men; and on the fifth of *October* cleared out for *Madeira*, and sailed from the *Downs* on the 11th *February* for *Portsmouth*, where, if any were, she would have found and joined convoy. On the 13th she was captured, off *Shoreham*, in the course of that voyage, having then on board only seven men. It appeared, that, in all cases when application is made at the custom-house for the clearance of a ship, it is asked by the officer there, whether or not she is to sail with convoy; and that no clearance is made out for any ship that is to sail with convoy, unless a bond is given as required by stat. 47 G. 3. c. 57. s. 5.: and farther, that when the *Providence* obtained her clearance at the custom-house, no bond was given; from whence it was inferred by the defendant, that it must there have been declared that she was not to sail with convoy. It was proved on the part of the insurers, that at the time of the clearance of the ship from *London*, although they had obtained a licence to sail without convoy, they had not finally determined whether or not they should avail themselves of it: but that they had resolved, if, upon their arrival at *Portsmouth*, they found a convoy ready to sail, to put themselves under the protection of it: if, on the other hand, no convoy was ready, they intended to avail themselves of their licence, and to complete their crew to the full complement thereby required. A question being put to the jury, as to this part of the case, whether or not, when the plaintiffs

A ship cannot legally proceed without convoy from port to port to join convoy, unless a bond has been given that she shall not sail without convoy.

[ 132 ]

A ship licensed to sail without convoy, provided she is armed with a certain force, must take that force on board before she breaks ground.

A ship licensed to sail without convoy with a certain force, and clearing out without giving bond to sail with convoy, and without having the force required, cannot legally go round from her port of clearance to a port of convoy.



1810. plaintiffs sailed from the port of *London*, \* they had determined to sail without convoy, the jury found that they had not so determined. A verdict was taken for the plaintiff: and in the last term, *Shepherd Serjt.* moved to enter a nonsuit, on the ground of the voyage being illegal; because neither had any bond been given for sailing with convoy, as is required by the convoy act, 43 G. 3. c. 57. s. 5., nor was the licence of any avail, its conditions not having been complied with. As this case turned altogether upon the construction of that statute, it is necessary briefly to state the provisions thereof, as far as they relate to the present subject. By s. 1 & 2. all ships belonging to the king's subjects are forbidden, (except as hereinafter provided,) to sail without convoy, and to separate therefrom without leave. By s. 3. a penalty of 1000*l.* is imposed on the master of any ship who shall sail without convoy, or shall separate without leave; and 1500*l.* if the ship be laden with naval or military stores; with a power, however, to the Court to mitigate the penalties to any sum not less than 50*l.* By s. 4. in case of a ship sailing without convoy, or separating, the policy of assurance is made void with respect to the property of the persons who have the charge of the ship, or of any person interested in the ship or cargo, who shall have directed, or have been privy or instrumental to the sailing or separating; and a penalty of 200*l.* is imposed for settling or paying losses upon such policies. By s. 5. it is enacted, that it shall not be lawful for any officer of the customs to suffer any vessel to be cleared outwards from any port in the kingdom, until the person having charge of the vessel, shall have given bond, with one surety, in the penalty of the value of the ship, conditioned not to sail or depart without convoy, contrary to the directions of that act, nor to separate without leave. Sect. 6. contains the exceptions from the operations of the above-mentioned clauses; among which it is specified, that nothing in that act contained, by which ships or vessels are required not to sail or depart without convoy, shall extend to any ship or vessel for which a licence shall be granted to sail or depart without convoy, either by the Lord High Admiral of *Great Britain*, or by the commissioners for executing the office of Lord High Admiral, for the time being, or any three or more of them, for that purpose; or to any ship or vessel proceeding with due diligence to join convoy, from the port or place at which the same shall be cleared outward, in case such convoy shall be appointed to sail from some other port or place; except, nevertheless,

HINCKLEY

v.

WALTON.

[ \* 133 ]

[ 134 ]

nevertheless, as to the bond thereby required to be taken upon the clearance outward of such ship or vessel.

*Best*, and *Pell*, Serjts. now shewed cause. The question is, whether this ship, under all the circumstances of the case, can be said to have sailed without convoy: she was sailing from a port where no convoy was provided, towards a port where it was probable she would find it. Till she had arrived there, it could not be known whether she would sail without convoy or not.

Therefore the penalties of the statute could not attach till she had reached that port; and what her intent was before her arrival there is not material; but if it were, the jury have expressly found that she had not determined to sail without convoy; therefore the Court cannot now infer, contrary to this finding, that such was her intent. [*Lawrence*, J. I think this question does not turn on the intent of the party. There are certain cases excepted from the general provisions of the act; one of them is, the case of sailing from the port of clearance in order to join a convoy. But to bring the case within this exception, there must be a bond given; and if there be no bond, the case falls within the general operation of the first section, which prohibits all voyages without convoy: then the voyage becomes illegal; and the policy is void upon the general principle, being made to protect a voyage forbidden by the law of the country.] It may be admitted that a bond ought to have been given, at the time of her clearance outwards in the port of *London*, and perhaps her owner or master might be liable to answer penally for obtaining a clearance without giving the bond; or the officer, for thus suffering her so to be cleared: but this omission will not vacate the policy. The policy is vacated only by finally departing from the kingdom without convoy, and the period of the final departure of this ship had not arrived. The 6th section of the act proves this still more strongly. The case of a ship sailing from her port of clearance to the port where she may find convoy, is expressly mentioned as a case excepted from the antecedent regulations, except only in respect to the bond. There is nothing illegal, or improper, in the plaintiff's delaying finally to determine whether or not they should sail with convoy, until their arrival at the port of rendezvous; they were not obliged to make their election sooner; and had still their option to make use of their licence, in case the convoy was not ready; and if they had in fact sailed from the place of rendezvous with convoy, and had the ship been lost, while under its protection,

1810.

HINCKLEY  
v.  
WALTON.

[ 135 ]

1810.  
 HINCKLEY  
 v.  
 WALTON.

the underwriters would have been liable within the terms of the policy, although in fact no bond had been given.

*Shepherd and Vaughan, Serjts. contra*, were stopped by the Court.

[ 136 ]

MANSFIELD, C. J. The plaintiffs in this case contend that the circumstance of not giving a bond, as required by the statute, does not vacate the policy. But the question is not, whether the policy is void for want of a bond; it is, whether the voyage is not illegal, as being in contravention of this statute, the ship having sailed without convoy, and under a licence, the terms of which were not complied with? It is plain that they meant to sail with a licence: they procure a licence to sail, with certain conditions annexed. It is equally plain that at the custom-house they must have declared their intention to sail without convoy, for it is proved that, otherwise, they could not have obtained their clearance without giving a bond. Then it appears, that they have not decided whether they should ultimately avail themselves of the licence, or sail with a convoy. But I think, that the sixth section, which directs the bond to be taken in cases where the ship is to sail from her port of clearance to her port of rendezvous, (and this voyage she may legally perform without a convoy,) shews that the owner is bound to decide, before he leaves the port of clearance, whether he will sail with convoy or not; for they are obliged to give the bond, and the condition of it is absolute, that they will sail with convoy. Otherwise, in such cases, no bond would ever be given: for the owner might always put off his final determination, or keep it in his own breast, till his arrival at the place of rendezvous, where it might not be possible to give the bond, and then he would be bound by no obligation either to sail with convoy, or to continue under its protection after he had sailed.

HEATH, J. was of the same opinion. It was impossible to say that the owner of the ship had the option contended for in this case. This would be virtually to repeal the act of parliament, and to provide an expedient that would be taken advantage of in all cases.

LAWRENCE, J. was of the same opinion.

Rule absolute to enter a nonsuit (a).

(a) *Chambers, J.* was absent, on account of indisposition.

1810.

## VOWLES v. MILLER.

July 9.

**T**HIS was an action upon the case brought by the tenant in fee of a close, against the tenant for years of the adjoining close for an injury to the plaintiff's reversion. The declaration stated, that the plaintiff on, &c., was, and continually from thence hitherto had been, and still was, seised in his demesne as of fee of and in a certain close called the *Ham* close, with the appurtenances, situate, &c.; which said close with the appurtenances, at the time of committing the grievance hereinafter mentioned, was, and from thence hitherto had been, and still was in the possession and occupation of one *James Vowles*, and of one *Henry Vowles*, as tenants thereof to the plaintiff. Upon the trial of this cause at the *Taunton* Spring Assizes 1810, before *Graham*, B., it appeared that at the time of the injury the close was in the possession of *James* and *Henry Vowles*: but at the time of the action being brought it was in the possession of *James* only. The plaintiff's proof was, that the defendant had a close contiguous to a certain close of the plaintiff's, and surrounded by a fence which the defendant was bound to keep in repair, consisting of a bank and ditch, and in scouring his ditch the defendant had dug it so wide as to cut into the plaintiff's soil: the defendant directed his evidence to prove that this fence had immemorially been a bank with a ditch on the outside of it, and not a bank only, and he contended that consequently he was entitled at common law to have a width of eight feet, as the reasonable width for the base of his bank and the area of his ditch together, which width, measured from the interior line of the base of his bank, he proved that he had not exceeded; admitting, that if the fence were a bank only, he was entitled only to four feet. The plaintiff, on the other hand, contended, that whether the defendant's fence were a bank only, or a bank and ditch, the action well lay; for he proved that the ditch was cut by the defendant's express direction into the hard unmoved virgin soil of the plaintiff's close; so that the ditch was made wider than ever it was before. The jury found a verdict for the defendant.

*Lens*, Serjt. in *Easter* term 1810, moved for a new trial on the part of the plaintiff; upon the ground that the verdict was against evidence. [*Lawrence*, J. The rule about ditching is this:

VOL. III.

H

No

If a person has a field fenced with a bank and ditch, it is not a necessary consequence that his ditch extends to the width of eight feet from the interior line of the foot of the bank, i. e. four for the base of the bank, and four feet for the ditch.

Proof of the ancient width of the ditch is evidence that the owner's land did not extend beyond the outer edge thereof.

And he has no right to cut away his neighbour's land for the purpose of widening the ditch.

In case, an averment that the plaintiff's close, at the time of the injury, was, and still was, in the occupation of

[ 138 ]

*J. V.* and *H. V.*, is sufficiently proved, if at the time of the injury it was in their occupation, though the tenant be since changed, before action brought.

1810.

—  
VOWLES  
v.  
MILLER.

No man, making a ditch, can cut into his neighbour's soil, but usually he cuts it to the very extremity of his own land: he is of course bound to throw the soil which he digs out, upon his own land; and often, if he likes it, he plants a hedge on the top of it: therefore if he afterwards cuts beyond the edge of the ditch, which is the extremity of his land, he cuts into his neighbour's land, and is a trespasser; no rule about four feet, and eight feet, has any thing to do with it. He may cut the ditch as much wider as he will, if he enlarges it into his own land.] The Court granted a rule *nisi*.

[ 139 ] *Pell*, Serjt. in the present term shewed cause; and upon the report of the merits of the case, the Court was of opinion in his favour, and discharged the rule; it appearing that the declaration did not apply to the close to which the above-mentioned injury was proved to be done, but to a different close. He also objected that the plaintiff should have been nonsuited at the trial for the variance. [*Mansfield*, C. J. In an action by the reversioner, it was sufficient to state in whose occupation the premises were at the time of the injury. It is quite immaterial who occupied them when the action was brought. *Heath*, J. was of the same opinion.] It would have been immaterial: but he has made it material by averring it. [*Mansfield*, C. J. How did it affect the merits of the case? There have been decisions both ways. It is now settled that an immaterial allegation need not be proved. So, in trespass, the question is, whose was the close when the trespass was committed? *Lawrence*, J. There is a difference between this case and the case of a trespass. In trespass every part is descriptive, and you must prove it all. *Purcell v. Macnamara*, 9 *East*, 160. 12 *Vin.* page 68. *pl.* 44 S. C. 2 *Roll. Ab.* 677. *Regina v. Cranage*, 1 *Salk.* 385. It is an entire description and cannot be severed. 1 *Camp.* 320 *Martin v. Goble*. But the action was not brought for the injury to the close that was proved in evidence, but for an injury to a different close.

*Lens*, Serjt. *contra*. This is different from a trespass where every part is descriptive and must be proved. This is not a part of the description which materially affects the merits of the case. It might be material to ascertain in whose occupation were the premises at the time of the injury committed, but no further. It does not signify who had it when the action was brought; this could not be taken advantage of at the trial. The cases cited do not apply: that from *Campbell* is nearest, but it turns on different

different point. There the plaintiff described as his tenants, those who could not possibly be his tenants. He made the tenancy part of the description. It was a material fact. There must be some identity of the premises. Here the close was, at the time of the injury, in the enjoyment of the very persons named. This is not like the strictness required in contracts. It is not like the case of words spoken, where the speaking is made local by the declaration. If you give locality to the words, you must prove it. The case of *Regina v. Cranage* was an indictment for a riot and a local trespass. Perhaps there might have been more colour for the argument if the occupier had been only one person. 12 Vin. 68. still less applicable. Abutments set out must be proved, otherwise it is not a trespass in that close, but in another. [*Mansfield, C. J. A nonsuit for calling St. Luke's, Chelsea, Chelsea only, was corrected. It is now held to be sufficient to use the name of a parish commonly used (a). That was a case of use and occupation. Purcell v. Macnamara was a case for a malicious prosecution. The variance was in the writ; the style of the Court:*

*MANSFIELD, C. J.* You must support your declaration by proving that when the injury was committed, the close was in the occupation of the persons named in the declaration, and then you have done enough. It is not necessary however to decide this point, as we think the verdict ought not to be disturbed.

Rule discharged.

(a) See *Kirkland v. Pownsett*, ante, 1. 570. *Williams v. Burgess*, ante, 3. p. 137. *acc.*

### BEAUCHAMP v. TOMKINS and SCHRADER.

THE defendant, *Tomkins*, was arrested in October 1805, at the suit of *Freebairn*. On the 19th of November, in the same year, he surrendered in discharge of his bail to that action, and to another at the suit of *Benj. Bishop*, and had ever since continued in custody. In 1806 he was brought up by *habeas corpus*, and charged with a writ of *capias adlagatum* at the suit of the plaintiff in this cause for a debt of 30*l.* 10*s.* The writ of *exigent* in this suit was tested the 6th of November 1805. In 1806, a several commission of bankrupt issued against him, and he had since obtained his certificate.

*Shepherd, Serjt.* had in the last term obtained a rule nisi that

H 2

the

1810.

VOWLES  
v.  
MILLER.

[ 140 ]

[ 141 ]  
July 7.

The Court of Common Pleas will reverse an outlawry upon motion, on error in fact sworn to. *Seemle* that bankruptcy and certificate is no ground of discharge of a prisoner in custody on an *utlagatum capias*.

1810.  
 BEAUCHAMP  
 v.  
 TOMKINS.

the defendant *Tomkins* might appear by attorney to reverse the outlawry, undertaking to appear and file common bail, and receive a declaration in any new action which the plaintiff might think fit to commence, and that thereupon he might be discharged out of custody.

The case was four times discussed in the same term; *Best*, Serjt. shewed cause. He contended, first, that the statute 4 & 5 IV. 3. c. 18. s. 4. extended only to outlawries in the Court of King's Bench; and that neither that, nor any other court in *Westminster-hall* had, before the statute, power to reverse outlawries on motion. The defendant was now liable to perpetual imprisonment under a criminal, not a civil proceeding; to which his certificate would be no bar; his goods, chattels, and lands were become the property of the crown, not of his assignees, and his only mode of relief was to obtain a pardon from the crown, which would only be granted upon the condition of his doing justice and paying his debts. That statute never meant to give even the Court of King's Bench the power of the crown to pardon outlawry upon motion; it only gave them the power of discharging upon motion in cases where they might before reverse the outlawry on error brought. But they could not reverse an outlawry, except upon some error assigned, which actually subsisted on the record, unless it were for irregularity. In the case of *Ashwell v. Stockwell*, *Barnes*, 324. the defendants came to the Court to set aside the outlawry for irregularity, which is evident from their praying that the plaintiff might pay the costs: in fact the defendant was beyond the seas; but unless the judgment had been irregular, this Court could not have relieved against it on motion. Where the defendant is properly outlawed, as it is admitted that here he is, the Court cannot, without the consent of the crown, take out of the crown the chattels and lands which their judgment has invested in it. [*Mansfield*, C. J. According to this argument the Court of King's Bench ought never to reverse an outlawry without giving notice to the Attorney-General, and hearing him on behalf of the crown, which is never done. *Lawrence*, J. The Court of King's Bench continually reverses outlawry on motion. *Buller*, J. used to ask, "What is your error?" And if counsel assigned error in fact, as sometimes they did, he would say, "that will not do; it must be error in law:" but when error in law is assigned, the Court never look into the record to see if the error exists there or not.] Those cases where, after error in law

law assigned, the outlawry has been reversed without examination of the record, to see if the error existed, have only been such wherein no one was interested to shew the failer of the record; but where there is an interest in continuing the outlawry, the Court cannot reverse it but for error actually subsisting; and if they did, and if any one who had an interest in disputing the legality of a judgment so given, should carry it to the next superior court, it is impossible that such a judgment should stand.

*Shepherd, contrâ.* If this be law, an outlaw in the defendant's circumstances can never reverse the outlawry at all, unless by error, which is unreasonable; for in that proceeding he must give bail to pay the debt, notwithstanding he is discharged by his certificate. But before the statute of *W. 3* an outlaw might appear in person in any court, and reverse the outlawry upon motion. [*Mansfield, C. J. and Heath, J.* It is a judgment, and how can a judgment be reversed otherwise than by a writ of error?] If before that statute he could not reverse an outlawry otherwise than by error, that statute would not help him. This Court has exercised, and does exercise, a power of reversing outlawry on motion. In *Barnes*, 19 & seq. are several cases to that effect. The contest in none of them is, whether the Court has title to proceed to reverse the outlawry on motion, but only as to the terms on which it shall be reversed. *Ashley v. Stockwell*, it is true, was not the case of a bailable writ, but inasmuch as this defendant is a certificated bankrupt, the Court will deal with him as if he had been such when he was arrested, and then the circumstance of the bailable writ makes no difference. If the Court do not in this case exercise, in favour of the bankrupt, the discretion which they undoubtedly possess, they will make a *capias utlagatum* in mesne process press harder on a certificated bankrupt than a *capias utlagatum* in execution. *Rex v. Castleman*, 4 Burr. 2119. 2127. the Court thought an outlaw relievable within an insolvent act. *Helij v. Henson*, *Barnes*, 821. there was no error at all on the record, yet the Court reversed it on motion, on the ground that the outlaw was a prisoner pending the writ of exigent. [*Lawrence, J.* The Court there proceeded on the ground that their process was abused; for the defendant was in the country, and by due diligence might have been found. *Mansfield, C. J.* You have not examined what was the practice in the Court of King's Bench previous to the statute of *W. 3*. The title seems to imply that the Court were in the habit of reversing outlawries; for it is "for the more easy and speedy reversing

1810.

—  
BEAUCHAMP  
v.  
TOMKINS.

[ 143 ]

[ 144 ]



1810.  
 BRAUCHAMP  
 v.  
 TOMKINS.

reversing of outlawries in the same court;" and the whole of the 4th section seems strongly to indicate the same practice. *Chambre, J.* Why do you suppose the statute of *W. 3.* is confined to the Court of King's Bench, where actions by original were few in comparison of the number in this Court, where they are much more numerous? The statute indeed has the words "said court;" but I cannot see on what foundation it should be so enacted. *Lawrence, J.* It seems by the case of *Symons v. Bingoe and Cook*, 1 *Salk.* 498., as if the practice was to reverse outlawries on motion in person before the statute.]

On a subsequent day

MANSFIELD, C. J. said that the Court had been in the habit of reversing outlawries on motion, but that some error must be mentioned. In 4 *Burr.* 2536. *Rex v. Wilkes*, such errors were allowed, that no outlawry can have been passed for a century which might not have been reversed for error. See if some error cannot be found in this outlawry.

*Shepherd, Serjt.* in this term abandoned his former rule, and on the authority of *Heely v. Hewson* obtained a new rule nisi, that the outlawry might be reversed upon the defendant *Tomkins* entering a common appearance, and that he might be discharged out of custody as to this action, upon the ground of error in fact, viz. that he was in prison when the writ of exigent was running; which facts appeared by an additional affidavit.

[ 145 ]

*Best, Serjt.* now shewed cause. The writ of exigent is tested on the 6th of *November*, and the defendant was not rendered in discharge of his bail until the 19th: he has also been before discharged under an insolvent act.

MANSFIELD, C. J. The effect of that is, that the action will not proceed against his person, but against his effects only.

LAWRENCE, J. The question is, whether he was in custody when the writ was sued out, not when it is tested. It is tested on the first day of the term, and probably, as usually is the case on a day before it was sued out.

It appearing, on reference to the affidavits, that he was in custody, as well when the writ was sued out, as when it was tested, the Court made the

Rule absolute

1810.

WILSON v. SPILSBURY.

July 11.

**BEST**, Serjt. had obtained a rule *nisi* for setting aside the proceedings which had been had in this case, and for restoring to *Maria Spilsbury*, the defendant's wife, the issues which had been levied upon the goods in her possession under a writ of *distringas*, with costs; upon an affidavit that the defendant, at the time of commencing this action, was, and still continued, beyond seas, in his majesty's service as a surgeon in the navy, on a station at *Halifax*, in *Nova Scotia*; and where he was likely to remain for a long time: and that the deponent had not, nor had any person to her knowledge any authority to appear for him. That she knew nothing of any cause of action the plaintiff had against the defendant. That she had not received any support from the defendant for nearly two years past.

The Court set aside a *distringas* executed upon the goods of the wife of a surgeon in the navy, serving on a foreign station, the debt not being contracted in the wife's trade.

[ 146

**LENS**, Serjt. shewed cause, upon the ground that the plaintiff in this case had made the levy without knowing that the defendant was abroad, and he relied on *Gurney v. Hardenbergh*, ante, i. 487. In this case the defendant's name still remained affixed on a brass plate on the door of the deponent's house, and she daily sold *Spilsbury's* Antiscorbutic Drops, bearing her husband's signature on the label.

**BEST**, in support of this rule. It is not sworn that the plaintiff did not know the defendant was out of the realm, which brings it within the case of *Greaves v. Stokes*, ante, i. 485. This is not a debt contracted in trade, like the debt of *Hardenbergh*.

*Cur. adv. vult.*

**MANSFIELD**, C. J. now delivered the judgment of the Court. This was a motion to set aside a *distringas*, and we think it should be set aside. There is no fraud in the case. The husband was in the service of his country. The woman has no other visible support. Her property must be taken away, unless she appears and defends an action, of the merits of which she knows nothing.

Rule absolute without costs.

DOE,

1810.

July 11. **DOE, on the Demise of Sir ARTHUR CHICHESTER, Bart.**  
v. **OXENDEN.**

Where there is an estate sufficient to satisfy a devise according to one meaning of the description of the premises, collateral evidence is not admissible to shew that the testator meant to use the description in a more extensive sense.

Devise of "my estate of *Ashton*," the testator having a maternal estate comprehending a manor, and capital farm, and lands, in the parish of *Ashton*, as well as several other estates, some in the adjacent parishes, some ten and fifteen miles distant; evidence is not admissible to shew that he was accustomed to call all his maternal estate,

[ 148 ]

his *Ashton* estate, to raise the inference that he meant to devise the whole by that name.

**THIS** was an ejectment brought by the lessor of the plaintiff as heir at law of Sir *John Chichester* Bart. on a demise laid subsequent to Sir *John Chichester*'s death; and at the trial before *Lawrence, J.* at the *Exeter* Summer Assizes, 1809, a verdict was found for the defendant, subject to the opinion of this Court on the following case. The lessor of the plaintiff was heir at law of Sir *John Chichester* Bart., who on the 30th of *September* 1808 died seised in fee as well of the premises in question, which composed his maternal estate, as of other property, which he derived from his father, called the *Youlstone* estate. The premises claimed consist of the manors of *Ashford*, *George Teign*, and *Stowford*, the tithes impropriate of the parish of *Nether Ex*, and two estates called *Great* and *Little Bowley*, in the parish of *Cadbury*, in the county of *Devon*: the manor of *Ashton* is situate in the parish of *Ashton*, with the exception of one insulated estate, parcel thereof, which lies in the parish of *Exminster*, adjoining to the parish of *Ashton*. The manor of *George Teign* is situate in *Ashton* parish: of the manor of *Stowford* one part lies in the parish of *Crediton*, and the other in the parish of *Sandford*; the manor itself being distant from the parish of *Ashton* about 12 or 13 miles. The parish of *Nether Ex* is also about 11 or 12 miles, and the parish of *Cadbury* 15 miles, distant from the parish of *Ashton*: with the premises aforesaid are comprised, besides the manor of *Ashton*, the barton of *Ashton*, and lands lying within the parish of *Ashton*. On the 3d day of *September* 1808 Sir *John Chichester* Bart., being seised as aforesaid, made and published his last will and testament, duly executed, so as to pass real estates, in the terms following: "I give  
" my estate of *Ashton*, in the county of *Devon*, to *George Chichester Oxenden*, (the defendant,) second son of Sir *Henry Oxenden* Bart. of *Broom*, in the county of *Kent*. I give the  
" house in *Seymour Place*, for which I have given a memorandum of agreement to purchase, and which is to be paid for,  
" out of timber which I have ordered to be cut down, to the  
" *Rev. John Sandford* of *Cherwill*, in *Devonshire*." To shew that

that by the words "my estate of *Ashton*," the devisor intended to dispose of the whole of the maternal estate before specified, the following, amongst other evidence, was offered by the defendant, and received. First, the verbal instructions given by the devisor, at the time of making the will, to the devisee *John Sandford*, who made the same, which were, to make a memorandum to guard against accidents, to give *George Oxenden* his, the devisor's, *Ashton* estate. Secondly, expressions which *Mr. Sandford* and the *Rev. Thomas Hole*, (the latter of whom had occasionally audited the devisor's accounts for 24 or 25 years previous to his decease,) had at various times heard the devisor use in describing his different property, viz. that in speaking of his paternal property, he used to call it his *Youlston* estate, and in describing his estate derived by him from his mother, he used to designate that by the general term of his *Ashton* estate, or *Ashton* property; and, particularly, on one occasion, directed that the timber should not be cut on his mother's property, the *Ashton* estate, but on his father's property. Thirdly, a series of annual accounts delivered to the devisor by *John Cleave*, and *John Smyth*, who were successively two of his stewards: these accounts commenced with the year 1785, and the form of each of them was very nearly the same. The following is a description of the form of one of these accounts: on the outside was indorsed, "*J. Cleave's account for Ashton estate, from January 1st, 1799, to January 1st, 1800;*" the first page thereof was thus headed—" *J. Cleave's account for Sir John Chichester Bart., for Ashton estate, from January 1st, 1799, to January 1st, 1800;*" in the first page was contained a list of the various payments made by *Cleave*, among which was the following.— "Paid a year's annuity to *Broad Clist* poor, to *Christmas* 1799, 23*l.* 11*s.*:" which parish of *Broad Clist* was wholly distinct from the premises sought to be recovered by this ejectment. but the annuity was charged on part of these premises. The 2d and 3d pages were entitled—"Receipts of rack rents," and contained an account of the rents of the several premises sought to be recovered by this ejectment, (except the conventional rents of three manors,) in separate sums, but added up at the end, into one general total. The 4th page contained a list of rents, intitled, conventional rents of the manor of *Ashton*. The 5th page contained a list of two other sets of conventional rents, the one intitled, "Conventional rents of the manor of *George Teign*," and the other intitled "Conventional rents of the

1810.

DOE,  
Lessee of  
CHICHESTER,  
v.  
OXENDEN.

[ 149 ]

1810. manor of *Stowford*." The last page of the account was intitled,  
 "Account stated." And was as follows:  
 Account stated.  
 DOE,  
 Lessee of  
 CHICHESTER,  
 v.  
 OXENDEN.

*J. Cleave, Dr.*

	£.	s.	d.
To receipts of rack-rent, as in pages 2 and 3	1042	12	2½
To receipts of conventional rents of <i>Ashton</i> manor	18	15	2
To receipts of <i>George Teign</i> manor	-	-	5 6 0
To receipt of <i>Stowford</i> manor	-	-	9 11 6
To balance of last account	-	-	102 2 6
	£1178	7	4½



[ 150 ]

*J. Cleave, Cr.*

By payments, as in page 1	-	-	708 7 0
By balance due from <i>J. Cleave</i>	-	-	470 0 4½
	£1178	7	4½

And underneath was the following receipt, the signature to which is in the hand-writing of the devisor.—*April 1st, 1810.*—Examined this account, and received the vouchers thereof, and due from *John Cleave* on the balance thereof, the sum of *£70l. 0s. 4½d.* *John Chichester.* The foregoing evidence was objected to by the counsel for the lessor of the plaintiff, as inadmissible, but was received, subject to the opinion of the Court as to the propriety of its being admitted. If the Court should be of opinion that the evidence was properly received, then the verdict was to stand; if not, then a verdict was to be entered for the lessor of the plaintiff, for so much of the premises, if any, as the Court should think did not pass under the will.

The case was twice argued, first in *Hilary* term 1810, by *Pell*, Serjt. for the plaintiff, and *Heywood*, Serjt. for the defendant; and again in *Easter* term by *Best*, Serjt. for the plaintiff, and *Lens*, Serjt. for the defendant.

For the plaintiff it was argued, that parol or other extrinsic evidence was not admissible to contradict, explain, or enlarge the effect of a will; it was admissible only in cases where there was an absolute necessity, because the will would otherwise be uncertain or insensible, and could have no effect without it, or where there was a latent ambiguity; and no such necessity or latent ambiguity subsisted in this case. All that class of cases where

where parol evidence has been received to repel trusts arising on presumptions, may be laid aside as irrelevant; (to which the Court agreed.) The testator had an estate of *Ashton*, viz. a manor of *Ashton* and the barton of *Ashton*, and other lands there; and having an estate \* of *Ashton*, he used the most appropriate words to convey it. If he had said, the manor of *Ashton*, it would not have comprehended the barton, nor if he had devised the barton, would it have included the manor. His "estate of *Ashton*" was his estate "of or belonging to *Ashton*." The words do mean that, and they can mean nothing else. At that period of the cause at which the evidence was offered, it was in proof, therefore, that the testator had an estate of *Ashton*; and there being enough, both in interest, and quantity of estate, and position, to satisfy the terms of the devise, the evidence ought not to have been received, but the case ought to have stopped there, unless it had been shewn that there was another *Ashton* estate belonging to the devisor. To admit evidence to shew that other land, besides that which suffices to satisfy the devise, was intended to pass, is in direct opposition to the statute of frauds. [*Mansfield*, C. J. This has nothing to do with the statute of wills, or with the statute of frauds: the question is, as has before been truly stated, whether evidence can be received to shew what the testator meant by these words; if there is a latent ambiguity, it is admissible; if there is none, it cannot; but still, if the evidence is admitted, the estate equally passes under a will in writing attested by three witnesses.] If it be admissible where there is estate enough to satisfy the devise, it would have the effect of so extending by parol proof the meaning of the will, as to pass other estates than those which the words of the will, taken alone, would pass. But never, not even at common law, could land pass by a will not in writing. [*Mansfield*, C. J. That is too general a proposition: for at common law, land did not pass by devise at all, unless by the customs of particular manors; and such customs might perhaps so regulate the form of devise, as that it might pass by parol. But that is irrelevant to the present question.] The precautions which the law has thrown around wills, by prescribing certain formalities to be observed in their execution, are rendered useless, if it is open to the Court to put on the words of a devise any other meaning than the obvious and common meaning which those words import. Before, therefore, any evidence can be let in to explain the words, it must be shewn that without such explanation the will

1810.

DOE,  
Lessee of  
CHICHESTER,  
v.  
OXENDEN.  
[ \*151 ]

[ 152 ]

1810.  
 —  
 Doe,  
 Lessee of  
 CHICHESTER,  
 v.  
 OXENDEN.

could bear no meaning at all, but would be void for uncertainty, and that it would be impossible to say what property was meant to be disposed of. In that case extrinsic evidence is admitted from necessity, as if the testator had had no estate of *Ashton*; but that is not so here. How can any man give an opinion upon the title to an estate, if he may not know by looking on the parchment or paper, what is the estate? if he is to hunt all over the country for circumstances *dehors* the deeds, it will shake half the titles in the kingdom. Here is something definite and certain to answer the devise, and there is nothing but conjecture to lead the Court to suppose that the testator meant any thing further than that which is plainly expressed. Therefore the lessor of the plaintiff is entitled to recover only such part of the premises as lies within the parish of *Ashton*. In support of these arguments reference was made to the following authorities: 5 Co. Rep. 63. *Cheyney's case*. *Rose v. Bartlett*, Cro. Car. 292 *Ulrich v. Litchfield*, 2 Atk. 372. *Day v. Trig*, 1 P. Wms. 286. *Beaumont v. Fell*, 2 P. Wms. 140. *Brown v. Selwyn*, Cas. Temp. Talb. 240. *Lord Walpole v. Lord Cholmondeley*, 7 T. R. 148. *Whitbread v. May*, 2 Bos. & Pull 593. *Doe, on demise of Brown, v. Brown*, 11 East, 441. Upon the case of *Ulrich v. Litchfield*, in which Lord Hardwicke, Chancellor, said, "I do not know that upon the construction of a will, courts of law or equity admit parol evidence, except in two cases: first, to ascertain the person, where there are two of the same name, or else, where there has been a mistake in the christian name or surname." [*Mansfield*, C. J. remarked, that the rule here laid down was certainly too narrow; for in case the testator had possessed no estate at *Ashton*, the rule would have excluded all evidence to shew what estate was meant. But from whatever cause the ambiguity proceeds, whether from a misdescription of the estate, or from a misdescription of the person, if there be a latent ambiguity, the parol evidence is admissible. In the case of *Lord Walpole v. Lord Cholmondeley*, there was neither a latent, nor a patent ambiguity: the testator, by reciting that by his last will and testament, dated the 25th of November 1752 he had devised his real estates, was held to republish that will.]

[ 153 ]

For the defendant it was contended, that this was a case of latent ambiguity. A latent ambiguity cannot be discovered to exist, but by the aid of collateral evidence, and if that evidence be such as would, if admitted, raise a doubt in the mind of the Judge, it ought to be received, and left to the jury. No one

one can see on the face of this will any ambiguity whatever. The word "of" does not denote locality in this case: it means all that estate which the testator called *Ashton*. He might designate his whole estate by the name of any one parcel, whether distant or near, if he had any reason in his mind for so doing. The word "of" is therefore distinguishable from "at," the expression used in *Whitbread v. May*, which might denote locality; and the Court not being bound to construe "of" as local, may give it any other construction which the evidence requires: the ambiguity is therefore raised, and by the same evidence it has been explained. And the only question is, what the testator intended to give. The old rule of law is, that evidence cannot be given against the purport of a deed or record, but it may be given to shew what are the parcels, or who are the parties. The circumstance that at a place called *Ashton* there are three or four things bearing that name, as the parish, the manor, the barton, and lands, is by no means conclusive against the defendant; on the contrary, it renders it necessary that evidence should be admitted, to shew what and which of them are included in the devise. In the testator's own parish of *Cadbury* are two estates of *Great* and *Little Bowley*. If he had devised his estate at *Bowley*, parol evidence would have been admissible to shew what estate he meant. If a man has been used so to name certain property, that none of his family can misunderstand him, when he uses that name, he may well devise thereby. In the case of *Doe, on demise of Brown, v. Brown*, there was a long interval of time in which the testator might have recovered from his error, and therefore no room to say there was an ambiguity: here there is evidence to raise the ambiguity, for the testator uses the expression continually to the very time of making his will. Nothing on the face of the will confines the property devised within a narrower compass than the county of *Devon*. The general principle contended for is much too wide, that the Court can in no case go beyond the words of the will: the only question is, to ascertain in what cases they can go beyond those limits. And the rule applies equally to personal as real property, that parol evidence is not to be admitted to make that pass by writing which is not expressed by writing; yet, in many cases, collateral evidence has been admitted to shew what personal property the testator intended to designate. No case has been cited which directly applies to sustain the position, that where there is property on which

1810.

DOE,  
Lessee of  
CHICHESTER,  
v.  
OXENDEN.

[ 154 ]



1810.  
 —  
 DOE,  
 Lessee of  
 CHICHESTER,  
 v.  
 OKENDEN.

[ 155 ]

which the will, taken in its most obvious sense, can operate, the Court is incompetent to look further. There is no doubt upon the real intention of the testator in this case. He called all his paternal estate his *Youlstone* estate, and all his maternal estate his *Ashton* estate, denominating both the one and the other, not from the name of the family from which he derived it, but from the name of the principal places upon the estate. The whole question is, whether the law prohibits the Court from calling in the same aid to ascertain the meaning to be attributed to the name of an estate, which it permits to ascertain the meaning of the name of a person. If the testator had used expressions of a definite legal meaning, parol evidence would not be admissible to shew that he annexed to them a different meaning; but when he uses words which are not technical, but of common parlance, the testator may annex to them whatever meaning he pleases. The following authorities were also referred to: *Bac. Max.* 23. *Wyndham v. Wyndham*, *And.* 58. *Dowsett v. Sweet*, *Amb.* 175. *Godbolt* 16. *Doe, on demise of Clement, v. Collings*, 2 *T. R.* 498. *Hinchcliffe v. Hinchcliffe*, 3 *Ves.* 516.; and *Pulteney v. Lord Darlington*, cited *ibid.* 529. *Doe, on demise of Cook, v. Danvers*, 7 *East*, 299. *Trimmer v. Bayne*, 7 *Ves.* 518.

In reply, it was urged, that Lord *Eldon* had much questioned the case of *Pulteney v. Lord Darlington* in the subsequent cases of *Pole v. Lord Somers*, 6 *Ves.* 322. and *Drace v. Dennison*, 6 *Ves.* 400. The case for the defendant would have been much stronger, if the deviser had denominated the one estate his *Audleigh* estate, from the name of his mother's family, and the other his *Chichester* estate, from the name of his father's family; for that is an usual mode of naming estates, and that would have been intelligible. [*Mansfield*, C. J. There you are upon bad ground; for if the evidence can be received, it is plain enough in this case what the testator meant.] The testator having an estate at *Ashton*, another at *Stowford*, another at *Barnminster*, desires his solicitor to frame a devise of his "*Ashton* estate." The solicitor does not however do that, but makes him devise his estate of *Ashton*, so that the evidence, when admitted, does not apply to this devise. The evidence is of no avail, unless it satisfies the ambiguity raised: and it is impossible to receive evidence of the meaning which the person who framed the will attached to certain words, and to prove that Mr. *Sandford* thought the "estate of *Ashton*" was synonymous with the

[ 156 ]

the "*Ashton estate*," in order to shew what the devisor meant. But the intent must be collected from the words themselves. It is incumbent on the defendant who contends for an exception to the general rules of law, to find authorities to support the doctrines he contends for, but in none of the cases cited has it happened, as here, that the testator has possessed a single estate which would satisfy the words of the devise.

1810.

DOE,  
Lessee of  
CHICHESTER,  
v.  
OXENDEN.

*Cur. adv. vult.*

MANSFIELD, C. J. now delivered the judgment of the Court. After recapitulating the case, and adverting to the evidence, he added: If this evidence ought not to be received, the consequence will be, that so much of the property only will pass, as is not affected by the evidence. I have doubted much upon it. The more, because in a less strong case, *May v. Whistbread*, two judges thought the evidence should be received. Lord Eldon increased my doubts. On the whole, I rather think we should go further in receiving this evidence, than any case has yet gone. There is an extreme jealousy in receiving evidence to explain written instruments. Many cases have been cited. In general they are well known. The last and strongest, was *Doe v. Brown*. There it was impossible to doubt what the testator meant. In this case my own judgment only is, if the evidence were admitted, that the testator meant to devise the whole of his maternal estate to his maternal relations, and not only the land locally situated at *Ashton*. But to decide in favour of this evidence would be going further than any Court has yet gone. I need not particularize the cases: of devises where there were two persons of the same name; where the name by which property was devised, applied equally to two estates. Such was the case in *P. Wms.* of a demise to *Gertrude Yardley*, by the name of *Catherine Earnly*, where there was no such person as *Catherine Earnly*. The case in *Ambler* of legacies to *John and Benedict*, sons of *John Sweet*: he had two sons, the name of one was *Benedict*, but the name of one was *James*. The evidence was received. It is not expressly said in any of these cases, that it was necessary to receive the evidence, in order to give effect to the will, which would not operate without such evidence. But although this is not said, yet the rule seems to hold. It will be found that the will would have had no operation, unless the evidence had been received. Here, without the evidence, the will has an effective operation: every thing will pass under it, that is in the manor or parish, or what he would

[ 157 ]

1810.  
 ———  
 DOE,  
 Lessee of  
 CHICHESTER,  
 v.  
 OXENDEN.

would naturally call his *Ashton* estate. This will be an effective operation; and this being so, the case herein differs from all the others; because in them, the evidence was admitted to explain that, which without such explanation could have had no operation. It is safer not to go beyond this line. Therefore only those premises pass which are in the manor or parish of *Ashton*; for all but them, the plaintiff has a right to recover.

Postea to the plaintiff.

July 11.

SLACK v. LOWELL.

Where goods are sold, to be paid for by a bill of a certain date, the price shall bear interest from the day when the bill would have been due, and

[ 158 ]

may be recovered as damages, on a special count for the non-delivery or non-payment of the bill.

But if, in such a case, upon a general count for goods sold and delivered, the jury give the price and interest as damages, the Court will not therefore set aside the verdict.

THE declaration in this action consisted only of the general counts for goods sold and delivered, and the money counts. The action was brought to recover 175*l.* 10*s.*, the price of 500 chests of oranges. 1465*l.* 2*s.* was paid into Court. The plaintiff, by a miscalculation in the rate of exchange, overcharged the defendant 11*l.* 5*s.* 9*d.*, which was therefore to be deducted from the amount claimed, and 277*l.* 2*s.* 3*d.* would have completed the residue of the price. They were to be paid for by a bill at 30 days, which the plaintiff tendered to the defendant for acceptance; and the defendant, on account of an alleged inferiority in the quality of the goods, which he nevertheless received, and of the overcharge in the rate of interest, refused to accept the bill. After the expiration of the 30 days from the date of the bill, the plaintiff commenced this action. The jury found for the plaintiff, and the plaintiff entered the verdict for 460*l.* 8*s.* 11*d.*, consisting of 277*l.* 2*s.* 3*d.* for the residue of the prime cost, and interest upon the whole price, as well what was paid into Court, as what was now recovered, computed from the day when the bill ought to have been given, to the time of the trial.

*Lens*, Serjt. in *Easter* term obtained a rule *nisi* to reduce the verdict to 277*l.* 2*s.* 3*d.*, the residue of the invoice price: he averred that the verdict for interest was taken by surprise and without his knowledge, the question not having been put to the jury. [*Lawrence*, J. Is there not this distinction, that if goods are sold without an agreed day of payment, the price shall bear no interest; but where payment is to be made on a day certain, does not the price bear interest from that day?]

MANSFIELD, C. J. In many trades there is a custom either to

to pay by cash at a day certain, or by a bill of a certain time; and the Courts have said, the buyer shall not be in a better situation by the breach of his contract.

*Shepherd and Best*, Serjts. in this term shewed cause. It is not necessary to declare specially on the non-delivery of the bill, if the day is past at which the bill would have become payable, and declaring after that day for the money, the price of the goods sold, the plaintiff may recover interest from the time when the money became due, in the shape of damages. To decide otherwise would only tend to prolixity in pleading, by inducing plaintiffs in all cases to add a count upon the special contract for the non-acceptance of the bill; if such a count had been here, it is clear the plaintiff might have recovered interest in the shape of damages for the non-performance of that part of the contract: and it has been decided that the same may be done upon the count for goods sold and delivered. *Mountford v. Willes*, 2 Bos. & Pull. 337. [*Chambre*, J. Such a count is sufficient in order to recover the price of the goods, but not to recover interest, without a count on the special contract. *Lawrence*, J. Lord *Kenyon*, C. J. tried at *Exeter* an action for money had and received against a sailor, who had taken and kept a public-house, and who, when he was drunk, had confessed that he set up in trade with the contents of a purse he had found on the road; and which was proved to belong to the plaintiff, and that the defendant knew whose purse it was; and Lord *Kenyon*, C. J. directed the jury to give interest at the rate of 5 per cent. from the time of his finding it. The case was never afterwards moved.] The plaintiff has a right to his interest, in the nature of damages, in point of justice. If there were a written contract that goods should be paid for on a day certain, and that on default the price should bear interest from that day, the increased sum would still be only the price of the goods, and the paper would be evidence upon a count for goods sold and delivered, to entitle the plaintiff to recover the whole. If a sale be made on similar terms, though not expressed in writing, the case is the same: and if corn be sold, to be paid for at the price of the next week's market, after the day is past, and the price ascertained, the seller need not declare on the special contract, but may generally declare for goods sold; because after that day the newly ascertained sum is the price; so here, goods being sold, to be paid for at a certain day by a bill, which if not delivered, or

1810.

SLACK

v.

LOWELL.

[ 159 ]

[ 160 ]

1810.

BLACK

v.

LOWELL

not paid, bears interest, after the days of delivery and payment elapsed, the contents of the bill and interest added constitute the price, and may be recovered as such upon a count for the price of the goods. A note or bill may on the face of it purport to bear interest or not: if it does the interest is part of the contents of the note; if not, the law gives it as damages for the detention of the debt; but the plaintiff does not in that case declare specially for the interest: it is sufficient that he declares on the instrument. [*Mansfield*, C. J. In *Mountford and Willes*, the Court only decided that if the jury took on themselves to give interest by way of damages, the Court would not, on that account, set aside the verdict. *Heath*, J. In truth, in the city the interest on goods is charged in the price; if you pay in ready money, the seller gives you discount. *Chambre*, J. Generally speaking, every tradesman fixes a price, which enables him to wait an indefinite time, by way of indulgence; and he goes out of his way when he stipulates for a particular day of payment. We should be doing a very beneficial thing to the fashionable traders at the west end of the town, if we could enable them to charge five *per cent.* on all their bills. To be sure something is said in this case about a precise mode and time of payment, but the difficulty is, that fact has not been submitted to the jury. *Mansfield*, C. J. The defendant refused the bill tendered, because the exchange was calculated a halfpenny too high: but upon the evidence, if there had been a count for not delivering a bill, the jury would certainly have found that the defendant had contracted to deliver a bill at that time.]

[ 161 ] *Lens and Vaughan*, Serjts., in support of the rule. It has been held, that interest cannot be recovered upon goods sold generally, nor can a contract to allow it from a time certain of payment be inferred. *Blaney v. Hendrick*, 3 Wils. 205. *Trelawney v. Thomas*, 1 H. Bl. 303. *per Gould*, J. Either *Mountford v. Wells* must be supposed to have been determined as a case upon a special contract, or it is over-ruled by the case of *Gordon v. Swan*, cited in the case of *De Bernales v. Fuller*, 2 Camp. N. P. Rep. 429. So *De Haviland v. Bowerbank*, 1 Camp. 51., and *Crockford v. Winter*, 1 Camp. 128. shew the opinion of the Judges in the King's Bench to be the same as to the count for money had and received. The like in *Tappenden v. Randall*, 2 Bos. & Pull. 472. *Moses v. Macfarlane*, 2 Burr. 1005. Interest is not the price of goods sold and delivered.

This

This is not distinguishable from the common case of goods sold and delivered: that indeed is rather a stronger case; for where the goods are delivered at the time, the law raises a debt immediately.

1810.

SLACK  
v.  
LOWELL.

MANSFIELD, C. J. The first question is, where a person promises to give a bill, does the law imply an engagement, in case no bill is given, to pay interest as if the bill had been given; secondly, if this be so, can the plaintiff take advantage of it to recover the interest in this form of pleading? I never could reconcile it to myself as reason, that any man who delays the payment of money which he owes, should not pay interest for it; but certainly that is not the law; nor, therefore, understand why interest should not be paid for goods sold and not paid for.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

MANSFIELD, C. J. This question arises upon a sale of goods, to be paid for by bills. There is no count for not giving the bills, only a count for goods sold and delivered. The action was brought after the time for the payment of the bills had expired. The interest was calculated from the time the bills would have become due. Such being the nature of the case, the question is, Whether the defendant, who ought to have accepted bills which would have carried interest, shall be in a better situation by breaking his contract, than if he had performed it. We think the defendant ought to pay interest. The application is to rectify a verdict which has given that interest. The merits being with the verdict, if there is no mis-computation, we will not alter it. The plaintiff is entitled to receive as much as if the defendant had accepted the bills, which would have carried interest.

[ 162 ]

Rule discharged.

WALDRON and Another v. COOMBE.

July 11.

THIS was an action brought to recover the loss sustained by the plaintiff, by the deterioration of some kerseymeres on board the *Earl Percy*, insured by a policy subscribed by the

must be calculated upon the invoice price, and not upon the price of the market at which the damaged goods are arrived.

The certificate of a British vice-consul at the *Brasilis*, of the amount of the proceeds of damaged goods, which by the law of that country are compelled to be sold under his inspection, is not evidence.

Where goods are shipped on an invoice, an average loss upon a policy

defendants.

1810.  
 ———  
 WALDRON  
 and Another  
 v.  
 COOMBE.

[ 163 ]

defendants, "at and from *London to Rio Janeiro*." The plaintiff averred a loss by perils of the sea. The defendant pleaded *non assumpsit*, and paid into Court 50*l. per cent.* Upon the trial at *Guildhall*, at the sittings in this term, before *Mansfield*, C. J., the plaintiff proved, that, if the goods had not been damaged, the market would have afforded a profit of 15*l. per cent.*; that the goods were damaged, apparently by sea-water, to a considerable degree; the witness would not have given 30*l. per cent.* for them; but the plaintiff gave no other evidence of the manner in which the damage was occasioned. To prove the amount of the loss, a witness produced a certificate from the *British* vice-consul there, of the amount for which the goods were there sold, being 9*l. 15s. per cent.* only, of the sum insured; and the same witness swore, that, by the law of the *Brazils*, and other parts of *South America*, the vice-consul is constituted general agent for all absent owners of goods, and that the same law authorizes and compels the vice-consul to make sale of all the damaged goods of all absentees, with the assistance of two *British* merchants as assessors. *Mansfield*, C. J. admitted this evidence, although *Best*, Serjt., for the defendant, objected to it, but reserving to him liberty to move. *Best* also contended that, as the plaintiff had given no evidence of any loss by perils of the sea, there was no proof of that allegation; in support of which proposition he cited *Rucker v. Palsgrave*, ante, i. 419.; for that the payment of money into Court did not admit any thing more than that the defendant owed 50*l. per cent.* for some cause or other; but *Mansfield*, C. J. held that it admitted that the loss was occasioned, as averred, by peril of the sea, and that the only thing in issue was the amount of the loss: and the jury, under his direction, found a verdict for the plaintiff for 40*l. 4s.* damages, with liberty to move to reduce it to 20*l.*, the surplus of 70*l. per cent.*, after deducting the 50*l.* paid into Court, if the Court should think the evidence was not admissible.

*Best* on a subsequent day moved for a new trial upon two grounds. First, that the certificate was not admissible evidence. Secondly, that although the defendant admitted damage occasioned by perils of the sea to the amount of 50*l. per cent.*, he had gone no further, and that the defendant, if he had not been prevented, would have given evidence at the trial, that other goods, sent by the same vessel, were in no respect damaged, from whence the jury might infer, that all the damage beyond the

the extent of 50*l. per cent.* was occasioned, not by perils of the sea, but by the improper stowage of the plaintiff's: they had not in fact even proved that there had been a storm, or an hour's foul weather during the voyage. [*Mansfield*, C. J. The payment of money into court admits the storms. *Lawrence* and *Heath*, justices. No facts are laid before the Court, from which we can infer that the defendant could put himself in a better situation if he had the advantage of a new trial.] The Court granted a rule *nisi* upon the admissibility of the evidence only.

*Shepherd*, Serjt., shewed cause. He contended first, that there was a mistake in the verdict, which, instead of giving 70*l. per cent.* damages, should have given 85*l.* damages; for it was proved that the goods were damaged 70*l. per cent.* below the invoice price, and that if they had been uninjured, they would have yielded a profit of 15*l. per cent.*, and the loss was to be computed, not on the invoice price, but on the market price of the place at which they had arrived, so that if the disputed evidence were inadmissible, it would make a difference of 5*l. per cent.* only in the amount of the damages. But supposing the verdict to be now computed upon the right principle, the evidence was sufficient to entitle the plaintiff to his verdict. This sale was compulsory; the vice-consul, as agent of the assured, could not do otherwise than sell the goods. The assured, acting for the benefit of the concern, could get at nothing more than the amount rendered by the vice-consul's account. The law put the sale into the hands of that officer. The loss, therefore, is what the owner sustains, taking this law, and the operation of it, into the account. He could get no more for the goods, therefore the loss is the difference between the sum received, and what the goods were worth when sound. The plaintiff's damage is to that extent. Suppose the law had been, that damaged goods should be burnt: although the sea should have only partially damaged them, yet the owner would have had a right to recover the whole value, if in consequence of that partial loss the law interfered and destroyed the whole. This is in the plaintiff's favour, whether the paper be evidence or not, that they have received only the proceeds of the sale according to that account. And unless the contrary be shewn, it must be taken that they receive no more. The defendant should have shewn that we did or might have received more. In another point of view the evidence is admissible: the vice-consul at the *Brazils* may be considered as the agent of all concerned. If so,

1810:

WALDRON  
and Another  
v.  
COOMBE.

[ 164 ]

[ 165 ]



1810.  
 ———  
 WALDRON  
 and Another  
 v.  
 COOMBE.

he is the agent for the underwriters; therefore his account would bind both parties.

MANSFIELD, C. J. It was in the like manner argued in a case here, *Heath v. Burgess (a)*, upon the loss of a trinket which cost a very few pounds in the *East Indies*, that the plaintiff was entitled to calculate the loss at an advance of 70*l.* or 80*l. per cent.* I held that against a carrier, as an insurer, he could only calculate the value of his goods at the invoice price. The case of an insurance was fully agreed upon there.

LAWRENCE, J. Surely it is understood, that when the goods are shipped upon an invoice, the loss is calculated upon that basis; when otherwise, recourse is had to the produce at the market.

MANSFIELD, C. J. The only question is, whether this loss should not have been proved by ordinary evidence. They should have had somebody to attend at the sale, who might have been a witness.

*Best, Serjt. contrd.* It does not appear that the law of the *Brazils* gives effect or authority to the certificate of the vice-consul. Custom-house officers are bound by law to attend clearances, &c. but their certificate does not prove any facts. It does not appear the vice-consul was sworn. There is no instance of such evidence being admitted. Judgments are pronounced in the presence of both parties.

[ 166 ] MANSFIELD, C. J. I thought at the trial it was very difficult to bring this within any head of evidence. It was somewhat analogous to the proceedings of courts and other public functionaries: but I know no instances of such as this being received. I dare say it would be evidence in any other country. It came nearest to the case of judgments in foreign courts. But we receive judgments under the seals of the courts. The vice-consul is no judicial officer. He acts under a wise regulation to prevent the improper disposition of damaged goods. They are put into warehouses appropriated to them by government. The vice-consul must preside at the auction. There is no rule in the *English* law which makes his certificate evidence. He has been supposed to be an agent, and he is, to some purposes. So is an auctioneer in this country; nevertheless his certificate is not evidence in a court of justice, but what was done at the auction must be proved. The business of the vice-consul is to see a fair

(a) *C. B. Mich. term 1809, and Hil. term 1810.*

sale. It is going much further to say that his certificate shall bind the parties. Any body present might have proved the facts. The chirograph of fines here proves itself, but the indorsement of the proclamation of the fine must be proved by a compared copy of the record.

Rule absolute to reduce the damages to 70*l.* per cent.

1810.

WALDROX  
And Another  
v.  
COOMBE.

---

DUFFY v. OAKES.



July 11.

**T**HIS was an action for false imprisonment. The defendant pleaded in the abatement of the writ, the privilege of an attorney to be sued by bill. The plaintiff replied, that at the time of suing out the writ, the defendant was one of his Majesty's justices of the peace for the borough of *Tunworth*, and that the trespasses were committed by him as such justice, in the execution of his office; and that notice in writing of the writ and cause of action was delivered to him one calendar month before the writ sued out. To this replication the defendant demurred, and the plaintiff joined in demurrer.

An attorney who is a justice of the peace for a borough, if sued by original for an act done

[ 167 ]

in his office as magistrate, may plead his privilege in abatement.

*Vaughan*, Serjt. in support of the demurrer, cited *Comerford v. Price*, 1 *Doug.* 312. to shew that an attorney may plead his privilege in abatement in any case personal to himself, though it do not concern his duty as attorney; although he cannot according to Lord *Raym.* 533. *Newton v. Rowland*, plead it when sued *in auter droit*.

*Williams*, Serjt., *contra*. By stat. 5 *Geo.* 2. c. 18. s. 2. no practising attorney shall be capable to be a justice of the peace in a county, but the 5th section gives an exception as to magistrates of boroughs. By 24 *G.* 2. c. 46. s. 1. no writ shall be sued out against, nor any copy of any process at the suit of a subject served on, any justice of the peace, for any thing done by him in the execution of his office without one month's previous notice in writing. It being admitted by the demurrer that the act done was in the execution of his office, the defendant was clearly entitled to a month's notice under that statute. This is decisive against the privilege, for the statute hereby contemplates, and even requires, that all actions against magistrates shall be commenced by writ or process to bring them into court. A writ clearly is not a bill, nor is process here meant for that which issues against an attorney, but against any common person.

1810.  
 ———  
 DUFFY  
 v.  
 OAKES.  
 [ \* 168 ]

son. The act therefore supposes, that whether the defendant is a county magistrate, or a borough magistrate, he must be sued like any other common person, and must have notice of the process. The act therefore, virtually takes away the privilege of an attorney under such circumstances.

*Vaughan* in reply, the privilege of an attorney is general, that of a borough magistrate local. It cannot be intended by this local provision to repeal the general privilege; or if intended, it would have been more plainly expressed. [*Mansfield*, C. J. The reason of the thing is with you, but the very terms of the act prescribe a writ or process, which seems to be that which is to bring a party into court: a bill of privilege is no process, it supposes the defendant to be already in court, and the very object of process in that case fails, therefore no process is necessary.] The act was meant in case of the magistrate, and it would be hard in any case to turn it to his disadvantage; and it may perhaps be considered as applying in this respect to county magistrates only.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

MANSFIELD, C. J. It was never intended probably that an attorney should act as a magistrate; but in boroughs this might be necessary. The question is, whether he is entitled to his privilege? Suppose he had been proceeded against as an attorney, and a notice of a bill had been given, I should have thought this a compliance with the act, though the bill is neither a writ nor a process. Then it follows that he has a right to be sued in this manner, as an attorney.

Judgment for the defendant.

[ 169 ]

July 4.

ALLEN v. BENNET.

An order for goods written and signed by the seller in a book of the buyers, but not naming the buyers, may be connected with a letter of the seller to his agent mentioning the name of the buyer, and with a letter of the buyer to the seller claiming the performance of the order, to constitute a complete contract within the statute of frauds.

It is no objection to the validity of a contract for the sale of goods signed by the seller, that the seller cannot enforce the same contract against the buyer, because the buyer has never signed it.

agent

THIS was an action of *assumpsit*: the first count of the declaration was for not delivering to the plaintiff a parcel of rice; the second and third counts were upon the non-delivery of two several quantities of tobacco, to the amount of many hundred pounds, pursuant to a contract made by the defendant's

agent with the plaintiff. Upon the trial of the cause at the *Warwick* spring assizes 1810, before *Bayley, J.*, it appeared that the defendant's agent had written certain orders in a book, the property of the plaintiff, the first of which was, "Ordered of *H. and G. Bennet, Liverpool*, 50 barrels fine new rice, 33s. 2 months and 2 months, as *per* sample, in running numbers. *W. Wright, August 23, 1809.*" Under this order had been written the following words: "This order to be executed if *Mr. Allen* does not hear from *Bennet* from *Liverpool* by *Saturday*:" but these words were afterwards struck out, in consequence, as it appeared, of a letter of *Bennet's* to *Wright*, dated 28th *August*, in which they authorized him to give *Allen* 2 and 2 months, and said that, in order to have no disputes about quality, they had sent him an average sample of the rice in hand; he should let *Mr. Allen* see it, and, if not approved, he was welcome to relinquish the transaction. It was in consequence of the same letter that the words 2 months and 2 months were inserted in the order, for which words a blank space was left on the 23d of *August*, when the entry was originally made. The second order was "From *H. and G. Bennet, Liverpool*, 12 cwt. fine shag tobacco," (and other quantities of different specified sorts.) "at 3s. 8d.; 2d. *per* lb. discount; bill in 2 months at — months. *W. Wright, Sept. 11, 1809.*" The third order was, "*H. and G. Bennet, Liverpool*, 8 cwt. fine shag tobacco, 3s. 8d.; 2d. *per* lb. discount; bill in 2 months at 2 months. *W. Wright, Sept. 12, 1809.*" The book in which these orders were written was not ordinarily used as an order-book; it had no title, but was a sort of waste book, containing various memoranda of different natures; and the plaintiff's name was not found written upon or in any part of the book from the beginning to the end. There was no evidence that the plaintiff had signed any contract or paper to bind himself. The defendants hesitated to execute the order, and thereupon some correspondence took place between the parties, in the course of which the plaintiff, on the 23d of *September*, wrote a letter to the defendants, wherein after giving them references as to his credit, he added, "the eight hundred weight of fine shag tobacco I wish immediately forwarded, as I have sold it, and it is wanted. I likewise want the invoice of the rice and the other tobacco." It was objected for the defendant that this was not, within the statute of frauds, 29 *Car. 2. c. 3. s. 17.*, a sufficient note in writing for the sale of these goods, inasmuch as it did not at all appear  
by

1810.

ALLEN

v.

BENNET.

[ 170 ]

1810.

—  
 ALLEN  
 v.  
 BENNET.

by the contract, who was the buyer; all that could be gathered from the entries was, that they were contracts entered into by *Bennet*, to sell goods to persons not named, and who those persons were, could not be supplied by parole evidence. *Bayley, J.* recollected the case of *Egerton v. Matthews*, 6 *East*, 307.; and inasmuch as the merits were with the plaintiff, at least as to the rice, he refused to nonsuit him, but reserved the point, subject to which the jury found a verdict for the plaintiff, for 130*l*. The learned Judge afterwards expressed his regret that he had not recommended to the parties that the plaintiff should remit something of the damages, and the defendants pay the residue, instead of their fighting the point.

[ 171 ]

*Shepherd, Serjt.*, in *Easter* term 1810, accordingly moved for a rule *nisi*, upon the authority of *Champion v. Plummer*, 1 *New Rep.* 252. In the case of *Egerton v. Matthews*, 6 *East*, 307., where the Court of King's Bench held a memorandum signed by the buyer only sufficient, it appeared by the contract who the seller was to be, which ingredient is here wanting, as it also was in the case of *Champion v. Plummer*, which was therefore distinguishable. With respect to the cases of contracts for the purchase of an interest in land, which will be cited, where a signature by one party has been held sufficient, as in *Seton v. Slade*, 7 *Ves.* 275., it is observable, that the 4th section requires only a note in writing signed by the party. Upon the 17th clause, it was essential that the names of both the contracting parties should appear on the contract. He also made a second point, that the declaration alleged that the rice was to be paid for in two months from the date of the invoice; whereas the true construction of the order was, that it was to be paid for in two months from the delivery; and the difference was material, for the seller might send his invoice immediately, yet protract the delivery, and so improperly accelerate the payment even to the day of delivery. [*Mansfield, C. J.* No doubt the two months would be explained by any merchant to be computed from the date of the delivery.] There was a further objection to the count on the second contract, that the declaration alleged it was to be paid by a bill at — months, which was too uncertain, and the number of months agreed on could not be supplied by parole evidence. The Court granted a rule *nisi* on all the points.

*Best and Vaughan, Serjts.*, in this term shewed cause. They relied on the plaintiff's letter of the 23d of *September*, as evidence that the plaintiff was a party to the contract, inasmuch as it referred

ferred to the identical order \*for 8 cwt. entered in the book. [Mansfield, C. J. The objection is not that there is no assent of the plaintiff, but that it does not appear by the memorandum who the buyer was.] It is not necessary that the contract should express either who the buyer was, or who the seller was, it is sufficient if there be a memorandum or note, in writing, signed by the parties to be charged; but if it be necessary to prove by writing who was the buyer, it is proved by the correspondence. The legislature, knowing the hurry of commercial dealings, directed that it should be sufficient if there were any memorandum signed by the parties to be charged. And here the parties whom the plaintiff seeks to charge, have by their agent signed a memorandum for the sale of the goods. *Egerton v. Mathews* is decisive on this point. There was no signature in that memorandum to bind *Egerton*, and though it is true that *Egerton* was there named, and the plaintiff here is not named, yet the writing these contracts in the plaintiff's book is at least equivalent to the naming him in that case; and Lord *Ellenborough*, C. J. there decided, that it sufficed if the memorandum were signed with the name of the party to be charged therewith: [Lawrence, J. If the plaintiff's name had been in this book, I suppose there would have been no doubt about it, and that brings it to the case of *Champion v. Plummer*.] To make this case parallel to that of *Egerton v. Mathews*, it is only requisite that there be some writing signed by the defendant, introducing the name of the plaintiff, and this name is found in the defendant's letter of the 28th August, to their agent *Wright*. In the case of *Saunderson v. Jackson*, 2 Bos. & Pull. 238., the name of the buyer is not at first inserted in the contract, but a letter is found referring to it, which was admitted, and it is only necessary to do here the same thing which was done in that case; to connect together the two papers which refer to each other.

*Shepherd, contra.* The case is now put upon a wholly different ground from that which it assumed at the trial whereon these letters were produced, not for the purpose of eking out the evidence of the contract, under the statute of frauds, but to prove the authority from the defendants to *Wright* to make the contract for them, which was then disputed, but which the jury distinctly found to have been given. *Saunderson v. Jackson* was not decided on the ground that another letter could be connected with the contract; the only question there was, whether there were a sufficient signature of the sellers; and it was argued for the

1810,

—  
ALLEN  
v.  
BENNET.  
[ \*172 ]

[ 173 ]

1810. buyers, that whether the seller's name were printed or written, whether it were put at the top or the bottom of the paper, was immaterial, and it was merely decided that there was a sufficient signature by the seller to satisfy the statute. The point now in question was never there mooted. [*Mansfield*, C. J., and *Lawrence*, J. The case decided thus much, that supposing the name printed upon the bill of parcels would not suffice, the name might be supplied from the letter sent by the sellers. *Mansfield*, C. J. If the signature of one of the contracting parties might be supplied by a letter written by him, *a fortiori* may a letter be used to shew who the buyer is, that buyer not being the party sought to be charged. There have been many cases in Chancery, some of which, I think, have been carried too far, where the Court has picked out a contract from letters, in which the parties never certainly contemplated that a complete contract was contained. Where a broker is introduced, the signature of the broker is the signature both of the buyer and of the seller; but this is not such a signature. This letter of the 28th August gives permission, that the plaintiff might take or relinquish the transaction just as he pleased. What transaction? A purchase of the rice to be sure!'] There is another material point. A promise made in writing to satisfy the statute of frauds, if made without consideration, is not more (a) binding than a parol promise without consideration, made in a case that does not require writing. [*Heath*, J., *acc.*] If there be a binding promise on one side, it is a good consideration for a promise on the other side; but in this case there is no signature by the plaintiff upon which he could be charged, if the defendant had occasion to sue on the contract; and if there be so, then there is no consideration for the promise of the defendants upon which the plaintiff now seeks to charge them. How can the statute of frauds so operate, as to make the written promise on one side valid, when it destroys the consideration for that promise (and which, at common law, would have been a good consideration,) the validity of the promise on the other side to buy the goods. [*Mansfield*, C. J. No such objection was ever taken in the case of *Champion v. Plummer*; it was there taken for granted, that there was a good consideration for the promise, if there was a signature in writing; and the words of the statute seem strongly to countenance such an interpretation, "signed by the parties to be charged there-

(a) *Rann v. Hughes*, Dom. Proc. 7 T. R. 350. n. *acc.* affirming the judgment of the Exchequer Chamber.

with."]

with." The words are "signed by the parties to be charged by such contract;" and without a consideration there cannot be a simple contract. Again, even if the contract may be supplied by subsequent writings, yet it cannot be eked out by parol evidence. The declaration for the rice alleges a contract for payment at two months, and two months from the date of the invoice; and there is no evidence in writing that the time of payment was to be computed from the date of the invoice. [*Vaughan* objecting that this defence had never been made at the trial, the Court were unanimous that it could not now be taken.]

1810.

—  
ALLEN  
v.  
BENNET.

MANSFIELD, C. J. To be sure this case at first sight comes near to the case of *Champion v. Plummer*, and the objection certainly there was, that the memorandum was not signed by the purchaser: that was a note made in what the report calls a common memorandum-book; this book certainly was not like what I at first apprehended it to be, until it was produced; for I at first thought this had been an order-book, with several orders signed by the persons who ordered them, and I thought that where such an order was inserted in a regular order-book, and supposing that the person to whom it belonged, the place in which it was kept, and the purpose for which it was employed, were consonant, it would in that case be no great stretch to say, this was a ground for inferring that these entries were made by the authority of the owner of the book, for the purpose of evidencing the sale. But in this book, though not appropriated to the entering of orders, *Wright* writes as *Bennet's* agent. The defendant's counsel distinguishes between an order and an agreement to buy; but if I go to a shop and order goods, do not I agree to buy them? The objection is that the name of the buyer does not appear in this book; but if it sufficiently appears that a sale was agreed on, I see no objection why it should not be made out what was the name of the buyer by the writing of these very defendants. In the first place, in this very letter, wherein they give the time of payment of two months and two months, which is afterwards found in this very book, the buyer's name is twice mentioned; and in that letter they give him liberty to relinquish the transaction. It is in writing, and it is evidently connected with the contract, that no doubt it may be coupled with the order in that order-book; and a valid contract may be established by the evidence of several writings, as we often see at *nisi prius*. It was then objected, that one party who has not signed, is not bound; but the fact was the same in the cases of

[ 175 ]

*Egerton*

[ 176 ]



1810.

—  
ALLEN

v.

BENNET.

*Egerton v. Mathews* and *Champion v. Plummer*, and the objection was never taken in either of these cases; but the whole of this case supposes that the plaintiff had agreed: suppose he has not contracted by writing, he has by parol, and he is bound in honor; and it has never been decided that an obligation in honor would not be a good consideration. All these cases, *Egerton v. Mathews*, *Saunderson v. Jackson*, and *Champion v. Plummer*, suppose a signature by the seller to be sufficient, and every one knows it is the daily practice of the Court of Chancery to establish contracts signed by one person only, and yet a court of equity can no more dispense with the statute of frauds than a court of law can, there is no reason therefore to set aside the verdict, and the rule must be discharged.

HEATH, J. was of the same opinion: and there is a case in *Strange (a)*, by which it appears that a voidable promise is a sufficient consideration for a promise.

LAWRENCE, J. It is sufficiently evident that this contract was entered into by the authority of the defendant. It is stipulated, "this order to be executed if Mr. *Allen* does not hear from *Bennet* from *Liverpool* by *Saturday*." A letter comes, and the conditional parts of the order are struck out, and other terms of the time of payment are added: can you then say that this entry is not made by the authority of the plaintiff, when he writes to the defendants on the 23d of *September*, insisting on the performance of the contract? Then as to the want of consideration, that objection would quite overturn the cases of *Egerton v. Mathews*, *Saunderson v. Jackson*, and *Champion v. Plummer*; and the statute of frauds clearly supposes the probability of there being a signature by one person only; it speaks indeed of the buyer accepting a part of the goods, as contemplating that the buyer would be thereby bound; but the statute seems to be made chiefly for the security of buyers.

[ 177 ]

Rule discharged.

(a) Qu. Whether *Barbeau v. Walmesley*, Str. 1249. be here meant.

[IN

1810.

## [IN THE EXCHEQUER-CHAMBER.]

HUBBARD v. JOHNSTONE, Assignee of T. WARD, a Bankrupt. July 10.

[IN consequence of the case of *Bloxam and Others v. Hubbard*, 5 East 407, (a), in which it was held that the order of the Lord Chancellor, directing that the defendant in error should be removed from the office of assignee of the estate and effects of *Ward* the bankrupt, did not divest the property out of him without a re-assignment, in *Michaelmas* term 1804, the defendant in error declared in trover, in the Court below, as assignee of the estate and effects of *Ward*, for the ship *Fishburn*, and for one-sixth part of the *Fishburn*. Upon the trial of the cause, at *Guildhall*, at the sittings after *Michaelmas* term 1804, before Lord *Ellenborough*, C. J., and a special jury, a special verdict was found, the substance of which was as follows: That *Ward*, the bankrupt, being the original and sole registered owner of the ship *Fishburn*, belonging to the port of *Newcastle-upon-Tyne*, in *April* 1810 cleared that ship outwards for the *Baltic*, where she was detained for a considerable time by an embargo of the Emperor of *Russia*: and that on the 9th of *November* 1801, *Ward*, by a regular bill of sale, in consideration of 4000*l.*, assigned the whole of the ship to *Hubbard*, the plaintiff in error, who then resided in *London*, and that the grand bill of sale of the whole ship was also delivered by *Ward* to *Hubbard*; that *Ward* was a trader, and becoming indebted to *Wilkinson*, *Bloxam*, and *Taylor*, in 100*l.*, became a bankrupt by lying in prison two months and upwards for want of bail: that on their petition, upon the 24th of *March* 1802, a commission of bankrupt issued against *Ward*, who on the 27th was thereon declared a bankrupt: that on the 30th day of *April* 1802, the commissioners assigned the vessel, and all the estate and property of *Ward*, to *Johnstone*, amongst others; that *Johnstone* was duly chosen an assignee; by virtue of which assignment all the estate, interest, and pro-

If a ship, registered at one port, is transferred, while at sea, to a purchaser residing at another port in this kingdom, the proper mode of perfecting the

[ 178 ] transfer within the requisitions of the ship register acts, is by a registration *de novo* in her new port.

And it is not necessary for the ship to return to her former port, in order to have a memorandum of the transfer indorsed on her certificate of registration;

Nor is it necessary for the purchaser to send a copy of the bill of sale to her former port;

Nor to indorse a memorandum of the transfer on her certificate of registry within ten days after the ship returns to *England*.

By five Judges against two.

The property of a ship vests in the purchaser instantly upon the execution of the bill of sale, not from the time of compliance with the register acts, defeasible, nevertheless, upon failure to comply with these acts. *Per Wood, B.*

The stat. 34 G. 3. c. 68. s. 16. applies to the sale of an entire ship in the same port, as well as to the sale of a share or shares therein.

The ship-register acts, so far as they apply to defeat titles, and create forfeitures, are to be construed strictly, as penal; not liberally, as remedial laws. *Per Wood, B. and Heath, J.*

(a) See also *Heath v. Hubbard*, 4 East, 110.

perty

1810.  
 ———  
 HUBBARD  
 v.  
 JOHNSTONE.

[ 179 ]

perty in the premises became, and still was, vested in *Johnstone*, as assignee; and that the commission still remained in full force; that on the 2d day of *February* 1802, *Hubbard* registered the ship *de novo* in the port of *London*; and the original certificate of registry granted to *Ward*, purporting on the face of it to be of the ship *Fishburn*, belonging to the port of *Newcastle-upon-Tyne*, was delivered up and cancelled; that on the 19th day of *February* 1802, *Hubbard* sold the whole of the ship, by public auction, to *T. Brown*, *R. Brown*, and *T. Old*, for 3630*l.*, the net proceeds being 3489*l.* 10*s.* 3*d.*; and by bill of sale of the 25th day of *April* 1802, assigned her to them: that *Brown* and Co. sent her to sea, and that the ship was lost on the 20th day of *February* 1803. And further, that the ship never returned to the port of *Newcastle-upon-Tyne* since she cleared outwards from that port for the *Baltic* in *April* 1800; but the embargo being taken off, she returned from the *Baltic*, and arrived at *Plymouth*; and that before the execution of the bill of sale by *Ward* to *Hubbard*, she had sailed, and was absent at the time of the execution thereof; that she afterwards returned to the port of *London*, and immediately thereupon *Hubbard* obtained a new register. It was further found that no transfer of property in the ship or any part thereof appeared in any document of the custom-house at *Newcastle-upon-Tyne*, either to *Johnstone*, or to *Hubbard*. That no indorsement of transfer was ever made to *Johnstone* on the certificate of the ship's registry, and that no demand of the ship was ever made on *Hubbard*. And if upon the whole matters it should appear to the Court that *Hubbard* was in construction of law guilty of the premises, then they assessed the plaintiff's damages at 581*l.* 11*s.* 8*d.*, which was one-sixth part of the net proceeds of the sale to *Brown* and Co. Upon this finding, the Court of King's Bench, after two arguments, gave judgment for the plaintiff below. The plaintiff in this Court assigned for error, that by the record it appeared that *Hubbard* had a good title to the ship, by the assignment and registry *de novo*.

[ 180 ]

The case was thrice argued; first in *Trinity* term 1807, by *W. Scott* for the plaintiff in error, and *B. Hall* for the defendant; the second time in *Michaelmas* term 1807, by *Richardson* for the plaintiff in error, and *Park* for the defendant; the third time in *Trinity* term 1809, by *R. Carr* for the plaintiff in error, and *Park* for the defendant in error.

The very able discussion upon the first argument, which took place

place before the period when the present reporter began to take notes in this court, is already in print. Upon the second and third arguments, for the plaintiff in error, five points were contended. First, that upon the sale of the entire property in a ship to an owner in another port, a registration *de novo* was the appropriate mode of completing and recording the purchase. Secondly, that the stat. 34 G. 3. c. 68. s. 16., was applicable only to the case of a sale of share or shares, not of the entire property in a ship. Thirdly, that supposing the provisions of the 16th section apply to the total alienation of a ship, yet they did not require that a ship, sold while at sea, should return to her original port of registration, for the purpose of completing the transfer; but they applied only to the case where the ship being sold while at sea, was destined to return to her original port; so that the ship, being sold at sea, might, if the purposes of her new owner made it convenient, proceed to her port of registration *de novo*, without returning to her original port; which position, upon the third argument, was said to be distinctly recognized by the 34 G. 3. c. 68. s. 22. Fourthly, that the sixteenth section did not require that the purchaser, upon the sale of an entire ship while at sea, and not destined to return to the same port, should send a copy of the bill of sale to the port of her original registration; and 5thly, if the 16th section did require such copy to be sent, yet that the omission to send it did not vacate the sale as between the vendor and those claiming under him, and the vendee. The purchaser having necessarily produced to the officer of the customs in the port of London, where he resided, the bill of sale of the ship to himself, having delivered up the original certificate of register to be cancelled, having taken a new oath, that he himself, a *British* subject, was sole owner, and having, after a survey taken to ascertain that the ship was *British* built, entered into a bond not to lend or part with the certificate of registry thus obtained, he had, by obtaining a registration *de novo*, fully satisfied, as well the enactments, as the policy, of the several register acts. It is necessary to take a review of the several statutes, and consider their object. By the statute 7 & 8 W. 3. c. 22. s. 17. "for a more effectual prevention of frauds which might be used to elude the intention of that act, by colouring foreign ships under *English* names," it was enacted, that no ship should be deemed or pass as a ship of the built of *England*, &c., or any of the plantations in *America*, so as to be qualified to trade to, from, or in

1810.

HUBBARD  
v.  
JOHNSTONE.

[ 181 ]

1810. any of the said plantations, until the person claiming part in such ship should register the same, as followeth, viz. ship at the time of such register, doth belong to any person in *England, &c.*, then proof shall be made upon oath of all more owners before the collector and comptroller of the customs in such port; which oath, by section 18, being attested by an officer who administered the same, under his hand and seal, shall, after being registered by him, be delivered to the owner of the ship, for the security of her navigation; a duplicate of which register shall immediately be transmitted to the commissioners of his majesty's customs in the port of *London*, to be entered in a general register, there to be kept for that purpose; with penalty upon any ship trading to, from, or between plantations in *America*, and not having made proof of her ownership and property, as here directed, that she shall be liable to prosecution and forfeiture as any foreign ship would, for trading with these plantations, by that law be liable to. Although the statute applied only to ships in the colonial trade, yet it is by the statute 26 G. 3. c. 60. s. 3. extended to all *British* ships exceeding 15 tons, with certain exceptions, and in all parts, wherein it is not thereby expressly altered, it still continues in force. These statutes therefore are together to be construed, as if the enactments of the latter had been contained in the former. The first act does not in its own words direct what shall be done in the case of a change of entire property in the same port: but it follows by necessary inference, that each successive proprietor shall take care to comply with the provisions thereby prescribed. In the case of a transfer of property to another port, it is required by the 21st section that there be a registration *de novo*, and that the former certificate be delivered up to be cancelled, and in case there be any change of property in the same port, by the sale of one or more ships on any ship after the registering thereof, that such sale shall be acknowledged by indorsement on the certificate of the ship, in order to prove that the entire property in such ship remains in some of the subjects of *England*. This is in case of the transfer of property in a ship to another port may be effected in two ways, first by an owner resident in or near one port going to an owner resident in or near another port; secondly, the owner changing his residence from one port to another, bringing his ship with him; neither of the two cases in which the legislature have expressly directed a registration *de novo*.

[ 182 ]

a change of the ship's name, and a transfer of the ship to another port, necessarily implies a change in the property. The transfer in the same port, which is to be evidenced by indorsement, does not refer to the local situation of the ship; (if it did, there could be no such thing as a transfer of property in the same port,) but it means the relation of the two owners to the same port. It means a contradistinction between a transfer which will, and one which will not, change the domicile of the ship. These two expressions do not, as the Court below thought they did, comprehend the transfer, of property that might be made in every possible local situation of the ship, whether in port or at sea; the phrase of alteration of property in the same port is restricted to such a transfer as does not change the domicile of the ship. The substituted registry by indorsement, does not therefore apply to the present case, of a transfer of a ship at sea, never intended to return to the same port. The distinction taken by the statute of W. 3., between indorsement on the certificate of registry, and registration *de novo*, has been recognized and pursued by all the subsequent statutes. In the present case there is not only a transfer of property, but also a transfer to another port; therefore whether this had been a sale of the whole interest or of a part only, the change of port would have required a registration *de novo*. The statute 26 G. 3. c. 60., enacts various alterations in the law. Much stress has been laid on the circumstance that this is an act for altering and amending the former, and also for extending it to other ships. The 4th section requires that no registry shall be made but at the port to which the vessel belongs. It is argued from this, that no registry can be made in the ship's new port; but the argument would extend so far as to operate as a complete bar of any ship ever changing her port at all. The 5th section defines her port to be that "from and to which she shall usually trade;" but if she is sold into a new port, her new port becomes that to which she shall usually trade. The sections 9, 10 & 11, repeal the former oath, and give one much more full. Section 12 directs a survey of the ship to be made before certificate granted, to identify her, and ascertain her built: these are amendments of the statute of W. 3. By the 15th section, the owners are required to give a bond conditioned that the certificate shall not be sold, lent, or otherwise disposed of, and shall be solely used for the service of the ship for which it was granted; and that in case the ship shall be lost, taken by the enemy, burnt, or broken

1810.

HUBBARD  
v.  
JOHNSTONE.

[ 183 ]

[ 184 ]

1810.  
 HUBBARD  
 v.  
 JOHNSTONE.

up, or otherwise prevented from returning to the port to which she belongs, the certificate, if preserved, shall be delivered up to the officers of the customs; and that if any foreigner shall purchase, or otherwise become entitled to any interest in such ship, the certificate shall be delivered up in order to be cancelled. This section, taken with the statute of *William*, clearly shews that there must be a registration *de novo* when the domicile of the ship is altered. The whole tenor indeed of the regulations contained in the first fifteen sections evidently shews that they are intended to be complied with by the owner of the ship for the time being, and the universal practice of the port officers has been according to this idea. If the entire interest may pass, as will be contended, without registration *de novo*, the government is deprived of all these securities for the owner being not a foreigner; without it, there will be neither oath, nor survey, nor bond; for it cannot be contended that if the property is transferred, the former obligor, who has discharged his duty while owner, will be still liable on his bond for the act of the assignee. [*Mansfield*, C. J. Though it could not be meant that the bond should operate after a new bond was given, it is not inconsistent that it should be in force until a new bond was substituted.] It would be hard that the obligor should be liable on his bond, after he had ceased to have a controul over the ship. But with a registration *de novo* the government has abundant security that the ship-owner must comply with the requisitions of the acts, and no other security needs to be added. The sixteenth section of the 26 G. 3. begins like a new act of parliament, reciting that

[ 185 ] “ the provisions touching the indorsement on certificates of registry, in case of any alteration of the property in any ship “ or vessel in the same port, had been found insufficient,” clearly making a distinction between the case of a transfer of the property in the same port and in any other port, without adverting to the circumstance whether the ship is at sea or in port at the time of the transfer; and enacts that in every *such* case, meaning an alteration of property in the same port, besides the indorsement before required, there shall be indorsed on the certificate of registry, the name and place of abode of the purchaser and his principals or partners, and the purchaser or his agent shall also deliver a copy of such indorsement to the person authorized to make registry and grant certificates of registry, who is thereby required to cause an entry thereof to be indorsed on the affidavit on which the original certificate of registry was obtained, and

and to make a memorandum thereof in the book of registry thereby directed to be kept, and to give notice thereof to the commissioners of the customs under whom he acts. Notwithstanding that this preamble, using the words "in case of any alteration of property in the same port," seems to embrace rather a wider scope than the 21st section of the 7 & 8 W. 3. c. 22. comprehends; yet there is strong reason to contend that the effect of this section is confined to those cases only which were comprised in that, namely, a partial transfer of property in the same port: for if it extends to the sale of entire interests, the legislature fail of their object, by not obtaining the security of an oath and a bond from the new owners. This security is less necessary upon a sale of a part, because the remaining original owners are still liable on their bond. But even if this section extends to sales of the entire interest, yet it applies solely to the case where by the former act an indorsement was to be made on the certificate of registry, viz. an alteration of property in the same port: it does not extend, as the defendant in error will contend it does, to every possible case of transfer of property. It does not at all touch the cases in which a registration *de novo* is requisite: it says, in every *such* case, not in every case. The Court will not strain their faculties to extend what is called the policy of the act, by adding new requisitions which are not expressed in the act, especially in one which introduced such important differences into the law as it before stood on this subject. If then the law were now such as it was after the passing of the 26 G. 3., the plaintiff in error has omitted nothing which was required by that and the former act. Then comes the 34 G. 3. c. 68., the fifteenth and sixteenth sections of which do not apply to a case like this, where a registration *de novo* is required, that is, a case in which the ship's domicile is changed. The 15th section recites, "that by the laws then in force, upon any alteration of property of any ship in the same port to which she belongs, an indorsement on the certificate of registry is required to be made." This has been relied on, to shew that the provisions of that section were intended to embrace every possible alteration of property, but it refers to the pre-existing statutes of W. 3. and 26 Geo. 3., and therefore was not designed to extend more widely than they did; and the latter, though the words are loose, must, like the former, be restricted to the sale of a partial interest, or otherwise sales of the entire property would evade the intent of the statute. This 15th section then prescribes

1810.

HUBBARD

v.

JOHNSTONE.

[ 186 ]



1810. prescribes a particular form to be pursued in *such* indorsement, and enacts, that it shall be signed by the person transferring, and that a copy of such indorsement shall be delivered to the persons authorized to make registry, otherwise such sale, or contract, or agreement for the sale thereof, shall be utterly null and void. It then proceeds to direct that the officer shall cause an entry of the copy of such indorsement to be indorsed on the oath on which the original certificate of registry was obtained, and shall make a memorandum thereof in the book of registry, and forthwith give notice thereof to the commissioners of the customs. This enactment in words applies only to the same case to which the sixteenth section of the preceding act applied, an alteration of property in the same port; and the only difference between the two statutes, in this part, is, that whereas under the former act it was open for the purchaser to express the indorsement in such language as he pleased, this act prescribes a set form. It is observable that this clause cannot apply to any case where there is to be a registration *de novo*; for there, a new affidavit is made; but this indorsement is to be made on the original affidavit, whereas upon a sale, whereby the ship changes her port, and obtains, as she must, or at least may obtain, a registration *de novo*, the original certificate of registry being thereupon given up to be cancelled, the original affidavit becomes an useless instrument. And to what purpose should these indorsements be afterwards made thereon? But in the case of a transfer in the same port, these indorsements are useful and operative. If then in the one case the compliance with these requisitions would be nugatory, in the other operative and useful it is a strong argument that the legislature intended to confine them to the case in which they would be useful, that is, to the case of a transfer where the ship does not change her domicile. If then any enactment be at all found respecting the transfer of the entire property in a vessel, made at a time when she is not in the port to which she belongs, it must be found in the 16th section of the 34 G. 3. whereby it is provided, "that if any ship or vessel shall be at sea, or absent from the port to which she belongs, at the time when *such alteration in the property thereof* shall be made *as aforesaid*, so that an indorsement (a) on the certificate cannot be immediately made, the sale, or contract, or agreement for the sale thereof, shall, notwithstanding, be made
- [ 187 ]
- [ 188 ]

(a) *Sic Rotul. Parl.*

by a bill of sale, or other instrument in writing as before directed, and a copy of such bill of sale, or other instrument in writing, shall be delivered, and an entry thereof shall be indorsed on the oath or affidavit, and a memorandum thereof shall be made in the book of registers, and notice of the same shall be given to the commissioners of the customs, in the manner thereinbefore directed; and within ten days after such ship or vessel shall return to the port to which she belongs, an indorsement shall be made and signed by the owner or owners, or some person legally authorized for that purpose by him, her, or them, and a copy thereof shall be delivered in manner thereinbefore mentioned, otherwise such bill of sale, or contract, or agreement for sale thereof, shall be utterly null and void, to all intents and purposes whatsoever, and entry thereof shall be indorsed, and a memorandum thereof made in the manner thereinbefore directed." It is said, that the provisions of the 15th and of this section, directing what shall be done when a ship is sold in port, and what when a ship is sold at sea, comprehend all the possible cases of transfers of property; but the 16th section is merely a proviso attached to the former section, and regulating what shall be done in such cases where the directions of the preceding section cannot be literally and immediately complied with, its operation is restricted therefore to the transfer of property in a ship in the same port, when the ship itself happens to be at sea. It is contended by the defendant in error, that in order to make a valid sale of a ship at sea, in compliance with this section, she must at all events return to the port to which she originally belonged. It is impossible that the legislature could ever have contemplated a provision so absurd and so destructive to the commercial interests of the country. A very great trade is now carried on in *Pulopenang* and other parts of *Asia*, and in *Prince Edward's Island* and other our colonies in *America*, in building ships, which are sent hither with their first cargo, and here sold. Under the construction contended for, it would be necessary to send them back thither, in order to indorse the sale there upon the certificate of registry, for the act extends to all ports of the King's dominions. [At the close of the second argument, the Court expressed their decided opinion that it was not requisite, for the purpose of completing the transfer of a ship sold at sea, that the ship itself should return to the port of her original registration.] Neither was it necessary for the purchaser to transmit

1810.

HUBBARD  
v.  
JOHNSTONE.

[ 189 ]

1810.  
 HUBBARD  
 v.  
 JOHNSTONE.

[ 190 ]

mit to the officer at *Newcastle* a copy of the bill of sale, because this was a transfer of the entire interest in the ship to another port, a case in which registration *de novo* is the appropriate mode of perfecting and recording the transfer. The 16th section provides for the like transfers of a ship at sea, for which the fifteenth provides in the case of a ship in port. If the 7 & 8 *W. 3. c. 22. s. 21.* and 26 *G. 3. c. 60. s. 16.* apply to sales of partial interests only, then the 16th section of the 34 *G. 3. c. 68.* must apply to partial interests also. That the legislature have recently understood the latter part of that section of the statute of *William* to apply only to the sale of partial interests, clearly appears from the preamble of the 21st section of 34 *G. 3. c. 68.*, which recites the statute of *W. 3.* as enacting that, in case there be any alteration in property in the same port, by the sale of one or more share or shares in any ship, after registering thereof, such sale shall be acknowledged by indorsement, and that it is expedient to authorize the issuing of registers *de novo*, in any case where part of the property of any ship shall be so transferred, if the owners of such ship, whose property therein has not been so transferred, shall be desirous of having the ship registered *de novo* instead of the indorsement on the old register, and proceeds to enact accordingly. This preamble, therefore, almost in terms recites, that the stat. of *W.* applies indorsement to the sale of partial interests only, and goes far to shew that all the clauses subsequent to and built on the stat. of *W. 3.* apply to the sale of partial interests only, and not to the sale of the entire ship. [At the close of the second argument, the Court intimated their decided opinion, that the 16th section of the 34 *G. 3.* related as well to the transfer of the entire property as of a share or shares in a ship.] It is not, however, necessary to the success of the plaintiff in error to evince that, upon a sale of the entire ship in the same port, registration *de novo* is necessary, for this is the case of the transfer of a ship at sea to another port. There can, however, be no doubt but that all the regulations of this section equally are confined to the case where a ship, which is sold at sea, is intended to return to the port from which she sailed. The Court has already said, that if a ship is built at *Pulopenang* or *Newfoundland*, it is not necessary for her to return to that port in order to complete the formalities of a sale. And for what conceivable purpose, when the ship is not intended to return to the same port, are all these indorsements to be made? It is said, for the purpose of tracing the history of  
 of

of the ship. But the statute no where says, that the object of the legislature is to trace the history of a ship: the ends it designates are, the preventing foreign property, in ships enjoying the privileges of our flag, from being masqued by the appearance of *British* ownership. As far as human foresight can go, though it is possible that false oaths may be taken, this purpose is effected by exhibiting the certificate of property obtained in every port upon oath. But it is not true, that any chasm would be created in the history of the ship by reason of her not transmitting a copy of the bill of sale to her former port. The 35th section of the stat. 26 G. 3. requires the officers of the out-ports monthly to transmit to the commissioners of the customs in *London*, a true and exact copy, together with the number, of every certificate granted. At the head office, therefore, is to be found the entire history of every ship, the history of that period of her duration, for which she has belonged to each port, being remitted from each port, respectively; and the several parts being connected, form the entire series of her history. Her identity may be sufficiently traced by her exact admeasurement and description. The 22d sect. of the stat. 34 G. 3. is a complete legislative recognition that, in the cases where a registration *de novo* is required, (and this is one of those cases,) a ship needs not to return to her former port, for it recites that *British* ships, the property of which is in whole or in part transferred to persons not being subjects of his majesty, are not entitled to the privileges of *British* ships, and that to prevent frauds in the employment of such ships as *British*, contrary to the intention of the laws of navigation, they are now by law required, in certain cases, to be registered *de novo*, for which purpose it is necessary that such ship should proceed with all due diligence to the port to which she belongs, or to *any other port in which she may be legally registered*, by virtue of the stat. 26 G. 3. in order to be registered *de novo*, and then proceeds in substance to enact, that in the cases of any such transfer of property while the ship is upon the sea on a voyage to a foreign port, or while she is in a foreign port, or while she is on a fishing voyage, so soon as the master is made privy to the transfer, the ship shall immediately complete her outward voyage and delivery, or her delivery, or her fishing voyage, and shall ship at such foreign port, or at any port in her direct homeward voyage to the port in which she may be so registered *de novo*, a cargo of such goods as may legally be imported into that port; and

1810.

HUBBARD  
v.  
JOHNSTONE.

[ 191 ]

[ 192 ]

1810.  
 HUBBARD  
 v.  
 JOHNSTONE.

and every such vessel shall be registered *de novo* as soon as she returns to the port of his majesty's dominions to which she belongs, or to any other such port in which she may legally be registered by virtue of the said act. [Mansfield, C. J. That section enumerates and provides for the three cases, where a ship is going to a foreign port, is in a foreign port, or is on a fishing voyage, but it omits a fourth case, that in which she may be sold while she is at sea on her homeward voyage: it certainly destroys the argument that in all cases the ship is bound to return to the port to which she belongs. The person who penned that act undoubtedly had it in his contemplation that, by the existing laws, the ship might in some cases be sold at sea, and a registration *de novo* take place; but he has left the world to guess what those cases are, for not a word in any one act states in what cases ships are to be registered *de novo*, except the provisions in the statute of W. 3.] The cases in which registration *de novo* is proper, are those where the ship does not intend, (and if she does not intend, it is admitted she is not compelled,) to return to her original port, and in which she therefore is not bound to observe the requisition of making an indorsement within ten days after her return. The last question is, supposing that the 16th section requires, in case of the sale of a ship absent from her port, that although she does not intend to return to the same port, a copy of the bill of sale shall nevertheless be delivered to the officer at her former port, whether it also annuls the sale in consequence of the non-compliance with that requisition. The sixteenth section directs, that if any ship shall

[ 198 ] be at sea when such alteration in the property thereof shall be made, the sale shall notwithstanding be made by such bill of sale, and a copy of such bill of sale shall be delivered; if it had been intended that the failure to deliver a copy should avoid the sale, the act would have said so immediately in this place, because as well the common rules of justice and common sense, as the decisions of the Courts, *Ratchford v. Meadows*, 2 *Esp. N. P. Rep.* 59., and other cases, evince that a sale is not avoided by the failure or neglect of the officers of the crown, and the delivery of the copy is the only act directed to be done by the purchaser while the ship continues at sea; but the section proceeds in the same breath to direct that an entry thereof shall be indorsed on the oath, and a memorandum thereof made in the book of registers, and notice thereof given to the commissioners of the customs, acts which are all of them to be

be done by the officers. Then comes a pause, succeeded by an entirely new part of the section, directing what shall be done within ten days after the ship's return, otherwise such bill of sale shall be utterly null and void: these words are applicable to a failure to comply with these last requisitions of the statute only, which are to be performed after the ship returns to port, and are not applicable to an omission to send the copy of the bill of sale; in order to reach which, the vacating clause must overleap the enumeration of the other acts which are to be done by the officers; whereas if it applies to the omission to send the copy, all rules of grammatical construction demand that it should likewise apply to the omission of those acts, to which it decidedly does not apply.

Arguments for the defendant in error.—The great fallacy lies in urging the Court to decide upon the strict letter of these numerous and intricate acts, without considering them as what they truly are, remedial acts, the policy whereof the Courts will do all they can to effectuate. The 35th section of 26 G. 3. affords the strongest argument to prove that it was the intention of the legislature to create the means of tracing the history of every ship from her cradle to the grave. It may be admitted that the ultimate end is the exclusion of foreign owners, but this is the mode by which they have determined to effectuate that exclusion. In 11 *Ves. jun.* 621. *Mestaer v. Gillespie*, Lord Eldon, Chancellor, assisted by *Grant*, Master of the Rolls, has delivered an opinion upon the policy of these acts. There, the purchaser carried the bill of sale to the port to which the ship belonged, within the ten days: but the seller fraudulently kept out of the way, whereby, and by the intervention of *Christmas* day and several holidays at the custom-house, the purchaser was prevented from perfecting the sale within the time prescribed. Yet even there the Master of the Rolls “doubted whether there were any ad-  
“missible evidence of the agreement to purchase, except that  
“very bill of sale, which was to all intents and purposes void  
“and null. It was to be considered,” he said, “that this act was  
“framed, not for the purpose of ascertaining the rights of parties  
“against each other, or protecting them from fraud, but with  
“the view to a great purpose of public policy; and the act in  
“all its provisions compels them to observe regulations, not in  
“any degree requisite for their own private interests, in order to  
“accomplish the ends of the acts. It may be said, the legis-  
“lature having proposed their object, proposed the only means  
by

1810.

HUBBARD  
v.  
JOHNSTONE.

[ 194 ]

1810. "by which that object was to be secured; judging of the pro-  
 priety of enforcing that object, and by such means; em-  
 ——— "bracing that object, and prescribing those means, whatever  
 HUBBARD "inconvenience might result to private individuals. The  
 v. "harshness therefore in particular instances is not to be taken  
 JOHNSTONE. "into consideration: the object being not to provide for the  
 "interests of parties, as against each other, but at all events to  
 [ 195 ] "obtain that great object of public policy; to which it might  
 "be thought right to sacrifice individual convenience and jus-  
 "tice, according to ordinary rules." Lord *Eldon*, Chancellor,  
 says, in the same case, that "the object of these acts being,  
 "that there should be a public registry, accessible, of the  
 "ownership of all vessels navigating to and from the *British*  
 "dominions, the legislature had declared that this object should  
 "be secured by a bill of sale, that should be such in the form  
 "and contents, as to manifest all the circumstances necessary  
 "to secure the knowledge, who were the owners from time to  
 "time, by which the history of the ship, from the moment she  
 "was built, might be pursued." At *Newcastle* the complete  
 history of this ship may be traced down to her transfer to  
*Heath* (a), but no further. In *Reeve's Law of Shipping*, (2 edit.  
 473., 1 edit. 501.) *Macneal's* case, the opinion of Lord Presi-  
 dent *Camden* is very important, in answer to the argument of  
 the plaintiff in error, which has ingeniously been directed to tie  
 down the attention of the Court to the question of fraud be-  
 tween individuals. Lord *Camden* there considering that the  
 statute of *William* had directed, that in the cases of change,  
 whether of the name or of the property of a ship in another  
 port, it should be registered *de novo*, points out how obnoxious  
 to frauds, and how perfectly inefficacious for the purposes in-  
 tended, this regulation was, he expresses his opinion that the  
 26th *Geo. 3.* was to be construed as a remedial act, and he lays  
 down the rule that "where property of a ship is transferred in  
 "another port, she must with all diligence proceed to the  
 "proper port where she may be registered: this port must  
 "be that of which she is, as it were, an inhabitant. This  
 "circumstance is a part of the certificate, is a part of the  
 [ 196 ] "oaths, and is essentially necessary to the registry." In fact the  
 officers of the custom-house have shamefully violated the law

(a) The transfer to *Heath* did not appear on this special verdict; it may be  
 seen in *Heath v. Hubbard*, 4 *East*, 110.

of the land, by habitually granting registration *de novo* in the cases of entire sales in the same port. There is only one case in which registration *de novo* is allowable on a sale in the same port, and that is, where new part-owners are thrust in upon a former one, and then if he chuses it, he may obtain a registration *de novo*, & *expressio unius est exclusio alterius*. Lord Camden says that "the statute of W. 3. did not point out the particular port where a ship should be registered, the consequence of that want of provision in the act, had been the multitude of frauds that were then continually practised in the registry of ships: for in any port whatever, if a person presented himself, and took the oath required by that act, he was entitled to have the ship registered. For it was remarkable that the act required no other security than the transient oath, as he called it, of any man whatsoever, who chose to offer himself, and who, the next minute, might slip away and never be heard of afterwards." And he had before said that "if it should be once laid down that such a ship might register in any other port than that where she was first registered, he was satisfied that the act of the 26th of the king, which he said was founded upon the best principles, and was wisely and sagaciously contrived by the noble person who was the author of it, to prevent the many frauds committed under the act of king William, would be wholly disappointed of its effect." Why? because this vessel might be in five hundred different hands between the time of her leaving Newcastle and the time of her registration in the port of London, and nothing of that would appear upon either register; there would be a complete break and chasm in her history. Lord Camden therefore considered that the 26 G. 3. had in every case, but the single one of an old part-owner desiring it, abrogated the right permitted by the statute of William, to take out a registration *de novo* upon a change of property. If the government, in order to ascertain the whole maritime force of the kingdom, were to require from the ports a return of all the shipping thereto belonging, this ship would be twice returned, once from Newcastle, evidenced by the original registry and indorsements, and again from London, evidenced by the resignation *de novo*. To prevent this, the plaintiff in error should have gone to Newcastle with the copy of his bill of sale, and should have required an entry thereof to be made upon the copy of the affidavit on which the original register

1810.

HUBBARD  
v.  
JOHNSTONE.

[ 197 ]



1810.  
 ———  
 HUBBARD  
 vs  
 JOHNSTONE.

[ 198 ]

gister was obtained, and also to be made in the original register books there. Then the Commissioner at *Newcastle* would have been able to return that the ship had at that period ceased to belong to their port, and that her subsequent history was to be sought in *London*. It has been asked (by *Mansfield, C. J.*) whether, consistently with the doctrine of the defendant in error, any insurance could effectually be made by the purchaser, after his purchase, upon a ship bought while at sea, and uninsured. It might; two things are to be done to perfect the purchase, the one *instantly*, no time is given; in *Moss v. Charnock, 2 East, 405.* it was held that the purchaser cannot take a reasonable time, and make the sale good by relation. This is to be perfected though the ship be at sea, and until it is done, no property passes. The other is to be done within ten days after the ship's return; and if she be prevented from returning by the act of God, or the king's enemies, the purchaser has a legal excuse for not doing that which was to be done after her return; and the omission in that case would not defeat his title as that he could not recover on the policy. But in this case the plaintiff in error never did that which he might well have done while the ship was at sea, he could not therefore have called on the Court to declare he had an interest in the policy, when he had not done that which was necessary to give him an interest. In *Hayton v. Jackson, 8 East, 511.* a case which in circumstances was exactly like this, *Lawrence, J.* went into the history of the register acts: he threw registration out of the question. [Here the counsel for the defendant in error read the whole judgment of *Lawrence, J.* in that case, p. 522.] It is not competent for the ship to send her certificate to her former port to have the indorsement made thereon, without going herself. By these acts, any one may seize her, if she is found without a certificate, and it is true, that if a ship built at *Calcutta*, be sold when she is within twenty leagues of *Great Britain*, she must, after delivering her cargo, return to *Calcutta* for the purpose of completing the transfer. [*Mansfield, C. J.* Nothing in the act says it shall be necessary so to do, and to be sure it is absurd to suppose that a person in *Europe*, buying a ship built in *Asia*, must send her back thither to be registered, before he can have any property in her. The 22d section of 64 G. 3. clearly supposes cases in which she needs not to return to her former port, although it seems as if the penner of the act had, in drawing the 16th section, supposed that a ship must

must in all cases return to her former port.] The Courts have leaned towards this construction, if they have not absolutely so said. The 22d section does not recognize that a ship may return to a new port to obtain registration *de novo* in this particular case, and it was never heard, that where it is necessary to make an express legislative provision in three cases, and no provision is made for a fourth, that the fourth shall therefore by common law follow the rule of the three. It is for the plaintiff in error to shew that this ship was in such a case, that she might, under the 26 G. 3., to which this section refers, go to another port to be registered *de novo*. [*Mansfield*, C. J. It does not appear that in any one of the three cases provided for by the 22d section, the ship is authorized by the 26 G. 3. to be registered *de novo*.] The alteration of property mentioned in these acts is not confined to a sale of part of the property, but as *Le Blanc*, J. in *Hayton v. Jackson*, says, the provisions of the two sections, the 15th and 16th of the 34 G. 3. c. 68., were intended to embrace every case of the transfer of property in a ship. It was said in that case, that the ship was not *so absent* from her port, as that registration could not be made, and was therefore not within the 16th section; but *Le Blanc*, J. held that "if she were not *so absent*, as to bring her within the 16th section, then the requisites of the 15th section ought to have been complied with." The effect is, that a person may sell a ship at sea, if he will, but he must immediately record upon the affidavit the history of the transaction. If it be a duty imposed on the officers of the customs to return the certificates to the commissioners, it certainly must be intended that copies of the certificates should be lodged with them. [*Mansfield*, C. J. That begs the question: the statute only makes it a duty on them to return copies of such papers as they have, but the 35th section does not shew what papers they are to be: it is certainly true, as Lord *Camden* says, that if these papers are not to be registered in the original port, there will be a chasm in the ship's history there, it will not appear what is become of her. A copy of the bill of sale sent to the original port would answer that purpose, though the ship itself never returned to that port, for it would shew to all persons inquiring, what was become of that ship.] It is not necessary to produce the old certificate in order to produce a registration *de novo*. [*Wood*, B. Yes, it was rendered necessary by the *st. W. 3.*, in case of obtaining a registration *de novo* upon the ship's

1810.

HUBBARD  
v.  
JOHNSTONE.

[ 199 ]

[ 200 ]

1810.  
 —  
 HUBBARD  
 v.  
 JOHNSTONE.

ship's changing her name. *Graham, B.* The register in *London* plainly shews it to be a purchase from *Ward*, a resident at *Newcastle*; it sets forth the bill of sale.] *Ward* may have changed his own domicile, and then the chain is lost. But not the judges of the court below only, Lord *Eldon*, Chancellor, and *Grant*, Master of the Rolls, in *Mestaer v. Gillespie*, 11 *Ves.* 621. are of the same opinion. The copy of the bill of sale therefore must at least go to the original port, even if the ship need not. [*Graham, B.* Is it sufficient to send a copy of the bill of sale? The section provides that an indorsement shall be made and signed by the owner and owners, or some person legally authorized by them upon certificate of registry; therefore he or they must come to the original port to indorse it. *Mansfield, C. J.* That part of the section strongly implies that the penner of the act intended a case where a ship would return to her original port.] The argument raised against avoiding the sale for want of sending the copy, which is founded on the intermixture of acts to be done by the party, and acts to be done by the officers, falls to the ground, when it is considered that in the 15th section the clause for vacating the sale follows after precisely the same omission of the owner, as that which in the 16th is mixed with the omissions of the officer; viz. if the indorsement be not made and signed by the person transferring, and a copy thereof delivered to the officer, and it cannot be intended that the same omission which shall avoid the sale in one instance, shall not avoid it in another.

Arguments in reply.—The extreme reluctance with which the defendant in error gives up the necessity of the ship's returning to its original port, sufficiently shews that the rest of his argument is untenable unless he can sustain that. The position that the sale is incomplete because a complete history of the ship cannot now be deduced, is not founded in fact. In compliance with the stat. 34 *G. 3. c.* 68. s. 20. before registration *de novo* can be granted, the officers must require the production of every bill or other instrument of sale, by which the property in the ship is transferred. That bill of sale recites the certificate of registry at length. The purchaser also produces the certificate itself, bearing indorsed thereon all the intermediate sales, and these instruments have been previously certified by the officers of the inferior port to the head office in *London*, so that when the registration *de novo* is granted, the head office has the means to trace the entire history of the ship to the present

[ 201 ]

sent day. [*Mansfield*, C. J. That does not help you to make out a complete history of the ship in her original port; the argument is, that you ought to be able, by inquiring at her original port, to trace her complete history.] It is true that the registration *de novo* in *London* is not necessarily certified back to the inferior port, but the statute does not require it, though in fact the head office does communicate intelligence to the officers of the inferior ports. But it suffices if the ship's whole history is to be found here at this head office, and as to the argument that if the ship's name be changed, all traces of her are lost, the statute 26 G. 3. s. 19., now prohibits any owner to give any name to a ship other than that by which she was first registered. The main argument for the defendant, is, that a copy of the bill of sale ought to be sent to *Newcastle*, which is answered by the rule, *noscitur a sociis*, for that requisition is found in company with one, which by the judgment of the Court needs not to be complied with, the ship's return thither. Supposing that the penner of the act founds himself on a mistake in thinking that in the cases mentioned by the 22d section, the stat. 26 G. 3. enables ships to obtain a registration *de novo*, yet it is a clear legislative exposition by himself, that he did not understand that he had himself in any previous part of the act required that a ship should return to the same port, and unless it be essentially requisite that the ship should return to the same port, there is no need of any indorsement subsequent to her return. The cases determined in the Court of King's Bench were dissimilar to this. In *Hayton v. Jackson*, the ship belonging to *Shields*, was not, at the time of the sale, at sea, but in the port of *London*. It was not in that case contended that the 16th section did not apply to the case of a ship sold at sea, but that it did not apply to the case of a ship sold while she was lying in another *English* port, consequently not in such a situation that indorsement might not be immediately made. The Court of King's Bench indeed thought the 16th section applied to the case of all ships absent from their own port, but all those cases are of weight only for their reasoning, not as an authority to be cited in a court of appellate jurisdiction. *Mestaer and Gillespie* was the case of a sale of a ship at sea, by a seller in *London* to a buyer in *London*. [*Mansfield*, C. J. That was not cited as a similar case, but only to shew the opinion of two noble persons on the policy.] *Macneal's* case is not applicable, it bears no similitude to this. Lord *Camden* calls *Macneal* a

1810.

HUBBARD  
v.  
JOHNSTONE.

[ 202 ]

1810.  
 HUBBARD  
 v.  
 JOHNSON.

sea vagabond, having no known residence, no property, no relations, no friends, having only a colourable interest in the party. [Mansfield, C. J. How is a transfer made to another port?] By the owner changing his residence. The words of the statute of W. 3. "transfer of property to another port" are deserving of particular attention, for they are repeated through all the succeeding statutes, and by words of reference in the 16th section of 34 G. 3.

*Cur. adv.*

The judges not being unanimous, on this day, delivered opinion *seriatim*.

[ 203 ]

WOOD, B. Having recapitulated the facts of the case, decided thus:

The question is, whether *Hubbard* is, in construction of guilty of the trover and conversion. It is contended by the assignee of the bankrupt, that the property in the ship did pass from the bankrupt to *Hubbard* by the bill of sale, because a copy of the bill of sale to *Hubbard* was not delivered to proper officer of registry at the port of *Newcastle*, which, insisted, is required by the statute 34 G. 3. c. 68. ss. 16., and consequently the assignee entitled to recover. The other hand, it has been contended that this case is not within those sections, this being a transfer of the property in the ship to another port. I will consider this case in two points of view: 1st, What is the effect of the non-delivery of the bill of sale, supposing the case to be within either of those sections; 2dly, Whether those sections apply to this case at all. To ascertain the true construction of these sections, it will be necessary to refer to the provisions of former statutes on this subject. The statute 8 W. 3. c. 22. is an act for preventing frauds and regulating abuses in the plantation trade. This act professes to be for the more effectual prevention of frauds which might be used to elude the intention of the act, by colouring foreign ships under *English* names. It had been the object of prior acts to confine the trade of this kingdom and its colonies, to ships of the built of this kingdom and its colonies, and navigated by *British* mariners; and to exclude foreigners from that trade. The act then provides, that no ship shall be deemed or passed as a ship of the built of *England, Ireland, Wales, &c.* or of Majesty's Plantations in *America*, so as to be qualified to trade to, from, or in any of the said plantations, until the

sons claiming property in such ship or vessel should register her at the port at which she belonged, in the manner \* therein prescribed. By section 21. the ship's name is not to be changed without registering the ship *de novo*. The same is to be done upon any transfer of property to another port. If there be any alteration of property in the same port, by the sale of one or more shares in any ship after registering thereof, such sale shall be acknowledged by indorsement on the certificate of the register, before two witnesses, in order to prove that the entire property in such ship remains to some of the subjects in *England*, if any dispute arises concerning the same. This statute seems not to have provided for the case of an alteration of the entire property in the ship in the same port. The stat. 26 G. 3. c. 60. s. 3. recites that it was highly expedient that the provisions made for registry of ships by the act of W. 3. should be altered, and amended, and extended to other ships than those which are therein particularly described; and therefore it is extended to all ships, and directs how they are to be registered, and the form of the certificate. Section 4. directs that no registry shall be made or certificate granted in any other port or place than the port or place to which such ship or vessel shall properly belong, and that the registry and certificate, if granted in any other port, shall be void. By section 5. the port to which she shall be deemed to belong, within the meaning of that act, is declared to be the port from and to which such ship shall usually trade, (or being a new ship,) shall intend to trade, and at or near which the husband or acting and managing owner or owners of such ship or vessel usually resides or reside. Section 16. recites that the provisions made in the said recited act, (referring to the statute of W. 3.) touching the indorsement on the certificate of registry in case of any alteration of property in any ship or vessel in the same port to which she belongs, have been found insufficient; and provides that in every case, besides the indorsement required by that act, there shall also be indorsed on the certificate of registry before two witnesses, the town, place, or parish, where all and every person or persons to whom the property in any ship or vessel, or any part thereof, shall be so transferred, shall reside. And the person or persons to whom the property is so transferred, or his or their agents, shall deliver a copy of such indorsement to the person authorized to make registry and grant certificates. The officer's duty is then stated; he is to cause an entry thereof to be indorsed on the oath or affidavit on which the original certificate

1810.

HUBBARD  
v.

JOHNSTONE.

[ \*204 ]

[ 205 ]

1810.  
 ———  
 HUBBARD  
 v.  
 JOINSTONE.

[ 206 ]

was obtained, he is also to make a memorandum thereof in the book of registers, and he is also to give notice thereof to the commissioners of the customs in *England* or *Scotland*. It has been argued that this provision only applies to the case where one or more shares in a ship, less than the entirety of the ship, are sold, and not to the sale of the whole of the ship. But, I must own, it appears to me to apply to the sale of the whole ship as well as to shares. But then I apprehend it is only applicable to those cases where the property is transferred in the same port to which the ship belongs. Here let us consider what would be the consequence if this provision were not complied with. I take it to be clear, so far as the statutes have hitherto gone, that if there were no registry, no certificate, no indorsement, and no delivery of a copy, the sale would be good as between the vendor and vendee, though for want of these requisites the ship, if she traded, would be treated as a foreign ship, and liable to confiscation; there being no words, as yet, declaring the sale null and void for want of these requisites. Hitherto there is nothing that even requires that the sale of a ship, or a share in a ship shall be in writing; it might have been by parol, save in cases where the statute of frauds might require a writing. The statute 26 G. 3. c. 60. s. 17. requires, that when and so often as the property in any ship or vessel belonging to his Majesty's subjects shall be transferred to any other subject, in whole, or in part, the certificate of the registry shall be truly and accurately recited in words at length, in the bill or other instrument of sale thereof, and that otherwise such bill of sale shall be utterly null and void to all intents and purposes. This clause does not positively say that there shall be a bill of sale in writing, but that if there be, the certificate shall be recited therein. By the statute 34 G. 3. c. 68. s. 14. it is enacted that no transfer, contract, or agreement for transfer, of property in any ship or vessel shall be valid or effectual for any purpose whatsoever, either in law or equity, unless made by bill of sale, or instrument in writing, containing such recital as prescribed by the said act of the 26th G. 3. When a bill of sale is made in writing, truly reciting the certificate of registry according to this section, it is, as I conceive, a good and valid bill of sale, and transfer of property, as between vendor and vendee, from the moment of its execution, and needs nothing more to perfect it; yet still it may be defeated or rendered void by the non-performance of certain subsequent acts required to be done on the part of the vendee, where it is expressly so declared.

What

What are those omissions? They are described in the 15th and 16th sections, or one of them. Section 15. recites, that by the laws then in force, upon any alteration of property in any ship or vessel in the same port to which she belongs, an indorsement upon the certificate of registry is required to be made; and it enacts that such indorsement shall be made in a prescribed form, and signed as therein mentioned, and a copy of such indorsement shall be delivered to the person authorized to make registry and grant certificates, otherwise such sale, or contract or agreement for sale thereof, shall be utterly null and void to all intents and purposes whatsoever: and the officer is to make certain entries and memoranda, and to give notice to the commissioners of the customs, similar to the provision in the 26 G. 3. c. 60. s. 16. No time is here limited within which the copy of the indorsement shall be delivered, and therefore I take it, the inference of law is, that it shall be done within a reasonable time, and until that time is elapsed, I hold the bill of sale remains good, and the property legally transferred to the vendee. In the present case the ship was not in port, but was at sea, and had her certificate along with her, and therefore she was not within the provision of the 15th section. Is she then within the 16th section, which applies to a ship at sea, or absent from the port to which she belongs, at the time when the alteration in the property is made, so that no indorsement can be made on the certificate of registry? What is to be done in that case? The sale shall notwithstanding be made by a bill of sale or other instrument in writing, as before directed, (that is, containing a recital of the certificate,) and a copy of such bill of sale or other instrument in writing shall be delivered, and an entry thereof shall be made on the oath or affidavit of registry, and a memorandum in the book of registers, and notice is to be given to the Commissioners in the manner thereinbefore directed. "And within ten days after such ship or vessel shall return to the port to which she belongs, an indorsement shall be made on the certificate, and a copy thereof delivered in manner hereinbefore mentioned, otherwise such bill of sale, or contract, or agreement for sale thereof, shall be utterly null and void to all intents and purposes whatsoever," and then it directs an entry thereof to be indorsed, and a memorandum made, as before directed. Here there are annulling words, and to how much of this section do these words apply? I think they are confined to the last-mentioned case, namely, the not making an indorsement on the certificate,

1810.

HUBBARD  
v.  
JOHNSTONE

[ 207 ]



1810.

HUBBARD

v.

JOHNSTONE.

[ \*208 ]

tificate, and delivering a copy to the proper officer, if the ship returns to the same port. It has been supposed that these annulling words extend to the antecedent provision for the delivery of the copy of the bill of sale; but I think that is not the true construction, because this section, after requiring the copy of the bill of sale to be delivered, requires certain acts to be done by the officers of the customs, viz. indorsement on the affidavit of registry, a memorandum in the book of registers, and notice to the commissioners; and if the annulling words, which come after all the words, were to be so extended, it would make the bill of sale void for the omissions of the officers of the customs which would be so monstrous, that the legislature could never intend any such thing; and how I am to single out the first member of the sentence, and say it shall extend to that, and not to the intermediate ones, I am at a loss to find out. The only rational construction I can put, is, that the annulling words do not extend to the former directions of the clause, and if not, the non-delivery of the copy of the bill of sale does not defeat the bill of sale; and I am not disposed to make a construction by inference, to defeat a bill of sale, or create a forfeiture. This difficulty has been attempted to be obviated, by contending that no property passes from the vendor to the vendee till all these things have been done; and the case of *Moss v. Charnock & East*, 392., has been cited to prove that position: and it is said, that if an act of bankruptcy intervenes before the delivery, although the delivery be within a reasonable time afterwards, the vendee loses the ship. With great deference to that authority, I cannot agree to it. I think the property passes instantly by the bill of sale, and that the subsequent acts to be done are not necessary to transfer the property, but that the grant is defeasible by subsequent omissions, in cases when it is so expressly provided, but not otherwise. If it were not so, then there could be no transfer of the property when a ship was at sea, until she had returned to her port, and an indorsement on the certificate had been made, and a copy delivered to the officer; and even though the statute gives 14 days after her return to do it in, yet if an act of bankruptcy happened within the 14 days, and before it was done, the sale would have no effect. This in my humble opinion would be extremely injurious to the public, and is contrary to the spirit, and even the letter of the provision, which supposes and recites that there may be an alteration in the property of a ship or vessel.

[ 209 ]

vessel whilst she is at sea, or absent from the port to which she belongs. On this ground therefore I am of opinion that the judgment of the Court of King's Bench is erroneous. There is also another ground not hitherto touched on, and that is, that this special verdict does not find as a fact, that a copy of the bill of sale was not delivered to the proper officer: it states a circumstance of evidence from which the jury might infer it, but facts, not evidence, ought to be stated in a special verdict; however this would only go to the granting a *venire de novo*, I lay no stress on this point, and I do not found my opinion upon it. The next point of view in which I shall consider this question, is, whether these two sections, the 15th and 16th of the 34 G. 3. c. 68. or either of them, apply to this case: and I think they do not. The 15th section does not apply to it, because that is confined to the alteration of property whilst the ship is in the port to which she belongs, that is, where she is registered, which is not this case. The 16th section, I think, does not apply to it, because I think it applies only to the case where the ship is at sea, or absent from the port to which she belongs, and means to return to that port; that is, where she has not changed her domicile by transfer to another port, which I conceive this ship had done. The nature of the provision of the 16th section, shews, that the legislature only contemplated the case of a ship being at sea, or absent from the port, and meaning to return to it, because all the requisitions are put in the conjunctive, and the last of them is an act to be done within ten days after her return. It is evident therefore that they only contemplated a case where *all* the requisitions could be complied with. But it has even been argued that a sale of a ship at sea cannot be made good, unless the ship actually puts herself into a situation to comply with every one of these requisites by returning to her registered port. Such an interpretation of the statute would be attended with monstrous inconveniences to the public without any one benefit. In that case, if a ship is registered abroad, say in the *East or West Indies*, and is sold in *Great Britain*, she must be obliged to go back again to the *East or West Indies*, to make an indorsement on her certificate, deliver a copy of the indorsement, and then bring her certificate to *Great Britain* to be registered *de novo*; and for what purpose? In order that her certificate may be cancelled and destroyed, and a new one granted here, when she is registered *de novo*. Is it possible any such thing could *ever* be intended? On the contrary,

1810.

HUBBARD  
&  
JOHNSTONE.

[ 210 ]

1819.  
 ———  
 HUBBARD  
 v.  
 JOHNSTONE.

[ 211 ]

contrary, look at the 22d section, and it is manifest the legislature meant otherwise; for it is expressly provided, that a ship sold at sea may either return directly to the port to which she belongs, or to any other port where she may be legally registered by virtue of the 26 Geo. 3.; and that as soon as she returns she may be registered *de novo*. This section does not appear to have been adverted to in the Court of King's Bench, and it might escape their notice, because there is a mistake in the marginal note of the contents of the section, which would lead one to suppose it related only to ships transferred to persons not subjects of his Majesty, whereas it provides regulations to prevent the transfer of ships to persons not subjects of his Majesty, and to prevent their fraudulently obtaining the benefit of *British* ships, by directing that ships sold at sea shall proceed without delay to complete their voyages, and return to this country, either to the ports to which they belong, or to some other, to be registered *de novo*. It is manifest to my understanding that neither of these sections, the 15th and 16th, apply to the case in question. This case, is the case of a ship transferred to another port, in order to be there registered *de novo*, and where her former certificate must be delivered up to be cancelled, according to the beforementioned statute of 7 & 8 W. 3. c. 22. There is nothing to prohibit the owner of a ship from changing her domicile, from one port to another, and registering her for trade there: a transfer of property to another port, (as I take it,) means a sale to a person living at another port, who removes her to that other port, and registers her there *de novo*, as the port from and to which she is in future to trade. This is conformable to sections 4 & 5 of the 26 Geo. 3 c. 60. This is a ship, whilst out at sea, sold to a person residing in *London*, who takes her to that port, and there registers her *de novo*. There she gains a new settlement, or domicile, and the port of *Newcastle*, (her former registered port,) has nothing further to do with her. The instant a bill of sale is executed transferring her to another port, the officers of her former port have no further account to keep of her. Neither do I see any public utility to be derived from delivering a copy of the bill of sale to the officers of the port she has quitted. Her identity and ownership (which are the objects of these regulations,) are fully ascertained to the officer of her new port by the production of her bill of sale, (which must always recite her certificate of registry,) and by the delivering up of her old certificate, with

all the transfers of property indorsed upon it, to the officer who grants a new certificate. Supposing, instead of being sold at sea, she had gone directly from *Newcastle* to the port of *London*, and had been there registered *de novo*, would there have been any necessity to have sent any notice to *Newcastle*, to be entered there, of her transfer to the port of *London*? There is nothing I can find, that requires it, nor any public policy that makes it expedient. The object of the registry of shipping, and of granting certificates, and making indorsements, was not to register titles for the security of purchasers, but to guard, (as the first statute expresses it,) against coloring foreign ships under *English* names, and to furnish evidence to the officers of government, that they were really *English* ships. Is not this sufficiently guarded by the provision contained in the 22d sect. of the 34 Geo. 3. ? which requires when a ship is at sea when sold, that she shall perform her voyage and return without delay either to the port to which she belonged, or to some other, to be registered, otherwise she would be treated as a foreign ship, and subject to confiscation. Are not her identity and ownership sufficiently ascertained to the officer who registers her *de novo* in consequence of a sale, by producing to him the bill of sale, and delivering up her former certificate with all its indorsements of transfers of property upon it? Is she not by these means traced from port to port from her birth, with sufficient certainty to prevent foreigners having the benefit of her navigation? And I cannot see how sending a copy of the bill of sale to the port she has quitted can be of any public utility. Upon the whole, according to the best judgment I can form upon these complicated provisions, many of which are obscurely worded, I cannot help thinking that upon this ground also the judgment is erroneous.

GRAHAM, B. This question depends on the construction of the 16th section of the stat. 34 G. 3. c. 68. The 15th section recites that by law, upon any alteration of property in any ship in the same port to which it belongs, an indorsement on the certificate is required to be made, and enacts that such indorsement shall be made in form therein mentioned, by the person transferring, or some person lawfully authorized by him, and a copy of such indorsement shall be delivered to the persons authorized to make registry and grant certificates, otherwise such sale, &c. shall be void: and the persons authorized to make registry, &c. are required to make an entry thereof, (i. e. of the copy of the indorsement,) to be indorsed on the affidavit on which

1810.

HUBBARD  
v.  
JOHNSTONE.  
[ 212 ]

[ 213 ]

1810.  
 HUBBARD  
 v.  
 JONESTON.

[ 214 ]

which the original certificate was obtained, and also make a memorandum thereof in the book of registry, and forthwith give notice to the commissioners of customs: then it gives the form of the indorsement on the certificate, expressing the names of the vendor and vendee, with their places of residence, its date, the signature of the vendor, and attestation by two witnesses. This applies to alterations of property while the ship is attached to its own port. In this case the vendee must shew, first, an indorsement in form on the certificate; secondly, he must deliver a copy of the indorsement, if not, his contract is void; the rest is to be done by the officer. The 16th section comes to the case of a ship at sea, or absent from her port. This may be in several cases: first, the ship may be destined to return to its port; 2dly, it may be sold *bond fide* while at sea, to an owner at London or other British port or settlement, never to return to her original port; 3dly, it may be sold at a British factory or settlement abroad; 4thly, it may be sold in either of the two latter cases to a foreigner. By section 16, it is provided, that if any ship shall be at sea or absent from the port to which she belongs, at the time when *such* alteration in the property shall be made as aforesaid, (grammatically, such as the preceding section speaks of,) so that an indorsement on the certificate cannot be immediately made, the sale or contract shall be by bill of sale, and a copy of it shall be delivered to the proper officer, and an entry thereof shall be made on the affidavit, and a memorandum made in the book of registers, and notice given to the commissioners of customs; (these latter articles are directory, and nothing is said of avoidance of the contract if these be not done;) then the clause goes on, connecting those provisions with what follows; "and within 10 days after such ship shall return to the port to which she belongs, an indorsement shall be made, and signed by the owner, or some person lawfully authorized by him, (not saying on the certificate, but I presume that must be meant,) and a copy thereof delivered, in manner thereinbefore mentioned, (referring to the copy required by the 15th section,) otherwise such bill of sale shall be void, and an entry thereof shall be indorsed, and a memorandum made in manner before-mentioned. Now the clause directing a copy of the bill of sale to be delivered, neither mentions the time when, nor annexes any avoidance to the omission, but looks only to the time of the ship's return, and makes the avoidance depend on something which can only be done in case  
 7 the

the ship returns, namely, the master's bringing home the certificate, on which the owner may make the indorsement, and deliver a copy of it; from which the indorsement may be made on the affidavit, and the other requisites may be complied with: and this was so strongly felt, that at first it was argued by the defendant in error that the ship must necessarily return to her former port. What would a ship-owner say who sells his ship at sea, and who was told it was necessary to comply with the regulations of this sixteenth section? He would answer, what avails it to send a copy of the bill of sale? I must also, if I am within this section, comply with all its requisitions, not with one only. I must make an indorsement on the certificate, and send a copy of the indorsement within 10 days after my ship's return to *Newcastle*. But it will not return thither; will it satisfy the act, if I do it within 10 days after its return to *Falmouth, &c.*? The act has not said so. Then this section cannot be complied with but upon condition that the ship shall return to her original port of registry, and it may be impossible for her ever so to do. In sending the bill of sale, when it will never be followed up by the other requisites, I do a nugatory thing. I must therefore look elsewhere in the act for my case. The direction of the delivery of the bill of sale, is connected with the indorsement to be made on the certificate, and the delivery of a copy of that indorsement to the proper officer. It is vain to do the first only; or if you construe the act to mean, that if he does not do all which his situation will admit of, his sale shall be null, you do not construe the words; that is rather to introduce a new proposition. Suppose, then, the purchaser had delivered a copy of the bill of sale, yet as he made no indorsement on the certificate, nor delivered a copy of it, his contract was void. No construction can save him from the words of the act. But, it is said, the object of the act was, to have the earliest notice of the transfer. It may be so; but the legislature has in this clause neither fixed a time for doing it, nor said what shall be the consequence of not doing it; the act looks only to the ship's return to port, and has elsewhere provided for its speedy return. The 17th section proceeds to the case where the owner resides at a *British* factory abroad, and provides for it imperfectly enough. Section 20 recites that, "it is expedient that the officers appointed to make registry, in case any ship is required to be registered *de novo*, should be authorized to require the production of the bill of sale," and enacts, that when the property in

1810.

HUBBARD  
v.

JOHNSTONE.

[ 215 ]

1810.  
 ———  
 HUBBARD  
 v.  
 JOHNSTONE.  
 [ \*216 ]

[ 217 ]

in a ship shall be transferred in the whole or in part, and such ship shall be required to be registered *de novo*, it shall be lawful for the registering officers to require the bill of \* sale. Provided always, that all other regulations concerning the registry *de novo* be complied with. Section 22. provides for the registry *de novo* by reference to the 26 G. 3. c. 60. Whereas *British* ships, transferred to persons not subjects of his majesty, are not entitled to the privilege of *British* ships; and to prevent frauds, they are now by law required, in certain cases, to be registered *de novo*, for which purpose it is enacted that such ship should proceed with due diligence to the port to which she belongs, or to any other port in which she may be legally registered by virtue of the act 26 G. 3. in order to be registered *de novo*, it is hereby enacted, that as often as any such transfer of property in any ship shall be made while such ship is upon the sea on a voyage to a foreign port, in case the master is privy to such transfer, or if not, as soon as he is, such ship shall proceed directly to its destined port, and shall sail from thence to the port of his majesty's dominions to which she belongs, or to any other such port in which she may be lawfully registered by virtue of the said act: then it provides for the case of a transfer while the ship is in a foreign port, or on a fishing voyage; concluding, "and every such ship or vessel as aforesaid shall be registered as soon as she returns to her port, or to any other port in which she may be legally registered by virtue of the said act." But it is said, that the 26 G. 3., to which this section refers, makes no provision for a registry *de novo*, and that this act therefore, only recognizing the legality of such a registration *de novo* as is directed by that act, does nothing. The 26 G. 3. c. 60. s. 3. takes up the purview of the 7 & 8 W. 3. purporting to alter and amend it, and extend it to other ships than those therein described, and enacts that all and every ship or vessel of 15 tons or upwards, belonging to any of his majesty's subjects, shall, from times referable to their different situations, be registered, and obtain certificates in this form: "In pursuance of an act " passed in 26 G. 3., intituled, &c. having taken and subscribed " the oath required by this act, and that the said ship was, at " such a time and place, built," &c. It is true that this act does not direct a registration *de novo* in the present case: but that is because it has made no new provision at all for the case of a ship sold not in the same port: the 16th section speaks only of alteration of property in the same port. But the misrecital, if

if it be such, is a mere inaccuracy in the penning of this section. The stat. 26 G. 3. provides for the original registry, and gives the form, and substitutes a new oath for that prescribed by 7 & 8 W. 3. and directs the bond not to sell or dispose of the certificate. Therefore in giving this form, the act in truth does direct the form of registration *de novo*: and the recital means only that the registry *de novo* shall be in the form, and attended with the requisites prescribed by the act. The former part of the preamble of the 22d section more correctly says, that ships are *by law* required, in certain cases, to be registered *de novo*; and in fact it is provided for by section 21. of the 7 & 8 W. 3. c. 22., which enacts, that no ship's name registered, shall be afterwards changed without registering such ship *de novo*, which is thereby required to be done upon any transfer of property to another port, and delivering up her former certificate to be cancelled, under the penalties and in the like method as is thereinbefore directed. The same section shews that the history of the ship may be sufficiently traced in the case of a registration *de novo*; it enacts that, "in case there be any alteration of property in the same port, by the sale of one or more share or shares in any ship after the registering thereof, such sale shall be acknowledged by indorsement on the certificate;" if therefore the former certificate be delivered up and cancelled, that certificate does as clearly shew from what port the ship comes, as the other documents could do. The production therefore of the bill of sale and delivery of certificate to be cancelled, sufficiently mark the identity of the ship.

CHAMBRE, J. was prevented by indisposition from attending, but Mansfield, C. J. stated, that he was authorized to say for him, that he concurred with the majority of the judges in reversing the judgment.

LAWRENCE, J. having sat in the court below when judgment was given there, delivered no opinion upon the present occasion.

THOMSON, B. was of opinion that the judgment ought to be affirmed.

HEATH, J. The question in this cause is, whether the ship in question having changed her port on her sale, she was properly registered *de novo*, pursuant to the statute of 7 & 8 W. 3. c. 22., or whether the provisions of the 16th section of the 34 G. 3. ought to have been complied with. On behalf of the plaintiffs in error it has been contended, that the 16th section of the 34 G. 3. is to be restrained in the construction to the shares of ships

1810.

HUBBARD  
v.  
JOHNSTONE.

[ 218 ]



1810. ships only, and is not to be extended to the transfer of the entire property of a ship. It was so argued in the Court below, and the attention of the Court of King's Bench was drawn to that question only. If this cause were to be decided on that point, I should be for affirming the judgment. But on the most mature consideration which I can give the subject, I am of opinion, that the 16th section is not a substantive independent clause, but is merely a qualification of the antecedent clause, and is to be restrained to the case when the ship is at sea when she is sold, and does not change her port. It will be necessary for me to take a short review of the three several statutes relative to this subject.

[ 219 ] The stat. of 8 & 9 W. 3. requires a registering *de novo* on a change of port only: the question is, whether that statute be in this respect repealed by the provisions of any subsequent statute. The stat. of 26 G. 3. s. 16. makes no alteration in that respect; but the statute of 34 G. 3. adds new provisions for the better effectuating the purposes of that act, among which one is, to direct a book of registers to be kept in each port, and notice to be given of every new registration to the commissioners of the customs, which is extremely important in the light wherein I view the subject. Now I come to the 34 G. 3. c. 68. ss. 15, 16., which directs what is to be done, according to the preamble, on any alteration of property of any ship in the same port. Two cases are put: the 15th section regards the case where the ship is in her port at the time of the sale; the 16th section, when she is at sea. The 16th section, though in form it is merely a qualification of the 15th section, inasmuch as it refers to it, and is by way of proviso, yet it is contended that it must likewise be considered as a substantive independent clause, and as repealing the stat. of 8 & 9 W. 3., which directs that, on a change of port, there shall be a registration *de novo*. It has been asserted by Mr. Park at the re-hearing, and in my judgment gratuitously asserted, that if the construction for which they contend be not adopted, these acts will be totally defeated, and foreigners will be enabled to become owners and part-owners in our ships without fear of detection, and that it will be impossible to trace a ship from her built, if the port shall be changed and a registration *de novo* shall become necessary. In answer to this assertion I shall observe, that it is not stated in any part of this statute, that the registering *de novo* on the transfer of a ship has been attended with any inconvenience, or that the purposes of the statute in question would be better answered by substituting another pro-

provision ; nor is it expressed in terms that the provisions of \*the section in question are substituted in the place of a registry *de novo*. It will be found in perusing the different parts of this act, that when it is intended to modify or repeal the provisions of any former statute, it is so expressly mentioned. The 16th section is likewise by way of proviso, and by every rule of grammar and logic it can only be considered as a clause dependent on a former clause, unless the manifest intention of the legislature required a different construction. In construing doubtful clauses it is very useful to trace the method which the drawer of the act has observed in the distribution and arrangement of his subject. In this act the drawer has arranged his subject under different and distinct heads, and to each head has prefixed an appropriate preamble. Now the preamble of the 15th and 16th sections states them to relate to the alteration of property in any ship or vessel in the same port. If the legislature had intended that the 16th section should extend to all cases of transfer, it would have used clear and explicit terms. Though this statute be remedial, yet it is very penal if all its requisitions be not complied with. For it annuls the contract, and leaves the purchaser to seek relief from, perchance, a fraudulent or insolvent vendor. In case of bankruptcy or insolvency it occasions a certain loss. These statutes are made for the advancement of trade and commerce, and to regulate the conduct of merchants. If laws of this sort be not perfectly clear and intelligible to persons of their description, the legislature, by the use of such ambiguous clauses, would lay a snare for the subject: a construction which conveys such an imputation ought never to be adopted. I think that the same rule ought to obtain here, as in the construction of clauses inflicting pains and penalties in the revenue laws, if they be ambiguously and obscurely worded, the interpretation is ever in favor of the subject ; for this plain reason, that the legislature is ever at hand to explain its own meaning, and to express more clearly what has been obscurely expressed ; and therefore if the supposed consequence were to follow, which I by no means allow, I should lean against the forfeiture, and leave it to the legislature to correct the evil, if there be any. I cannot persuade myself in the present instance, that any merchant of plain sense and understanding could ever entertain the most remote suspicion of the 16th clause extending to all cases of transfer. If any thing can warrant such a construction, it must be the general utility, which I am at a loss to discover. If any suspicion should arise whether

1810.

HUBBARD

v.

JOHNSTONE.

[ \*220 ]

[ 221 ]

1810.  
 HUBBARD  
 v.  
 JOHNSTONE.

ther a ship in part or in the whole belongs to a foreigner, it would be either in the port to which she belongs, or where she happens to have been built, but most generally in the port to which she belongs. In the first case the register will give the history of the ship, when and where she was built. If she has belonged to several persons at different times, and consequently has been often registered, such registers are deposited with the commissioners of customs, pursuant to the stat. 34 G. 3., by means of which the ship may be traced from the port where she was first registered. By such means it may always be discovered whether a ship be *British* owned, and is *British* built, the two principal objects of the legislature. If the construction contended for by the defendants in error be adopted, it will afford a very easy evasion of the statute. For if a foreigner should be minded to have a property in *British* shipping, he needs only to make his purchase in a port different from that to which she belongs, and then change her port; and he will neither make oath nor give security. These are the pledges on which the legislature principally relies for the efficacy of the act. Thus he may evade it and elude discovery: add to this, that according to the construction contended for by the defendant in error, if the ship  
 [ 222 ] be sold when absent from her port at the most distant quarter of the world, she must return to her port before the sale can be complete; a monstrous grievance, most unnecessarily inflicted. A strong argument may be drawn from the 20th section of the 34 Geo. 3. at the end, namely, "Provided always that all the other regulations required by the laws in force concerning the registering *de novo* of ships and vessels be complied with." This provision recognizes and enforces the two former statutes of 7 & 8 W. 3. and 26 Geo. 3. sect. 21. My conclusion therefore is, that the stat. of 7 & 8 W. 3. in this respect is not repealed, but is still in force, and therefore the registration *de novo* is right and proper. For these reasons, as I am of opinion that without this forced construction of the 16th section of 34 Geo. 3. it may be discovered by the several provisions of these three statutes, whether a ship be *British* owned and *British* built, the two great objects of the legislature, and as a different construction would tend to defeat the purposes of these statutes, the judgment of the Court of King's Bench ought to be reversed.

MACDONALD, C. B. A transfer may be made, either to a person of the same port, or of a different port, of the ship being at home, or at sea. The stat. 7 & 8 W. 3. is the foundation of all.

all. This requires a registration. And the 21st section requires a new registration on a change of port, and in that case requires the old certificate to be delivered up. It requires that when the property is to be changed in the same port, then the change shall be indorsed on the registry. This distinction is not repealed by the subsequent act, but improved. Nothing about this is found in the 26 G. 3. The subject is taken up in 34 G. 3. c. 68. ss. 15, 16 & 17., all these I construe together. The 16th section is a restriction on the 15th. The 15th applies only to transfers of ships in the same port, and the 16th section applying to the same subject, but contemplating a temporary absence of the ship, so that the certificate could not be had, substitutes the next best thing. The penner of this act expected the ship to return to the same port. I think the section only applies to ships still belonging to that port; but if not, I think that the annulling clause at the foot of section 16. applies only to the neglect to endorse the transfer upon the certificate of registry within ten days after the ship's return, otherwise it must include the neglects in the middle of the section, viz. by the officers. The 17th section, as well as the 16th, is a qualification of the 15th section; the 16th when the ship is absent, and the 17th when the owners or either of them are absent.\* On what then does the registration *de novo* depend? On 7 & 8 W. 3. s. 21. which is bare of regulations, but has the important one of delivering up the old certificate. This subject is taken up by the 22d section of 34 G. 3. which hurries ships home when sold at sea, under circumstances which require registration *de novo* at another port. No link in the history of the ship is wanting; a person inquiring at *Newcastle* would be referred to *London*. I think the delivery of the copy of the bill of sale of no use. The causes of registration *de novo*, are, 1st, Where the ship is sold to another port, by the stat. W. 3. 2dly, When the certificate is lost. 3dly, Where the ship's name is altered. 4thly, Where the certificate is wrongfully withheld from the owner. 5thly, Where a part-owner requires it. I think the *Fishburn* did what was right. If she had done otherwise she would not have done enough.

MANSFIELD, C. J. I doubt, but think the judgment ought to be affirmed. The ground on which I think so, is, that no copy of the bill of sale was sent: no question of reasonable time for sending it, arises in this case, because none was sent at all. If the 16th section had stopt in the middle, it would have been clear, and the confusion arises from the latter part, which applies

1810.

HUBBARD  
v.  
JOHNSTONE.

[ 223 ]

[ 224 ]

1810.

HUBBARD

v.

JOHNSTONE.

to a new subject, viz. the return of the ship to her own port. What is the object of requiring a copy of the bill of sale to be sent? To give immediate notoriety to the sale, and prevent foreigners from trading with *British* ships? It was intended for this purpose that the delivery of the copy should be made immediately. The 16th section receives considerable explanation from the 17th. The 16th applies only to the sale of a ship being at sea. The 17th contemplates the case of a sale when the owners are abroad. In that case it allows 6 months for the delivery of the bill of sale, and 10 days for the indorsement after the ship returns to *any* port in this kingdom. It has been supposed in argument, that if a ship be sold at sea, the purchaser has a right to change her port; and that if he does change her port, a registration *de novo* is sufficient, and it is unnecessary to observe the requisitions of the 16th section. But how is it to be known whether the purchaser will change her port? It is, at the time of sale, a profound secret. My brothers seem to think that the purchaser's residence in another port is sufficient. I think not. If indeed he takes her to that port, and begins to trade to and from thence, then that begins to be her port, and he is compellable to register her there, under 7 & 8 *W. 3. s. 21.* which in that respect I think is in force. The unfathomable intention of the purchaser to transfer her to another port cannot, I think, be material. I think the purchaser of a ship may carry herto another port and register her there, but then he must first deliver a copy of the bill of sale. The 21st section refers to registrations *de novo* by virtue of the 26 *Geo. 3.*, whereas that act authorizes no registration *de novo*. It is said the history of the ship may be traced without a copy of the bill of sale being sent: some of its history may be traced, but a sale may be suppressed.

Judgment reversed.

END OF TRINITY TERM.

C A S E S

[ 225 ]

ARGUED AND DETERMINED

1810.

IN THE

COURTS OF COMMON PLEAS,

AND

EXCHEQUER-CHAMBER,

IN

Michaelmas Term,

In the Fifty-first Year of the Reign of GEORGE III.

---

AHITBOL v. BENEDETTO.

July 26.

**A**T the sittings at *Guildhall*, after *Trinity* term, before *Lawrence*, J. this cause was called on, when no attorney appearing for the plaintiff, *Shepherd* and *Best*, Serjts. proposed to withdraw the record, which, as they had retainers in the cause, they conceived they were, on that account, authorized to do.

A retainer in a cause without a brief, does not authorize counsel to withdraw a record at *nisi prius*.

*Lens*, Serjt., who appeared for the defendant, contended that a retainer did not authorize counsel thus to take charge of the interests of the cause, and that such a thing had never been done in any case where opposition was made to it on the part of the defendant.

*LAWRENCE*, J. could not conceive that a mere retainer authorized a gentleman at the bar to interfere so far in a cause as to withdraw the record; and by his direction the cause was called on, a jury were sworn, and the plaintiff was nonsuited, with liberty to move to set aside the nonsuit, either in case his counsel

[ 226 ]

M 2

should

1810. should find that they had had briefs delivered to them, which they had left at home through negligence or mistake, (for which the client ought not to suffer;) or in case the Court should be of opinion, that a mere retainer, without a brief, authorized counsel to order a record to be withdrawn.

—  
AHITBOL  
v.  
BENEDETTO.

The plaintiff did not venture to move this case in the ensuing term.

Nov. 7.

SCOTT v. GILLMORE.

A bill of exchange, part of the consideration for which is spirituous liquor sold in less quantities than of 20s. value, is totally void, though part of the consideration was money lent.

The statute 24 G. 2. c. 40. s. 12. making illegal the sale of spirits in less quantities than to 20s. value, unless paid for, extends to spirits mixed with water.

[ 227 ]

THIS was an action brought upon a bill of exchange for 10l. 10s. 10d., against the acceptor. Upon the trial of this cause, at the *Middlesex* sittings after last *Trinity* term, before *Mansfield*, C. J., it appeared that the drawer gave this bill to the keeper of a coffee-house in payment for the balance of a debt, part of which was contracted by the loan of small sums of money, and part was for spirits, and spirits mixed with water, furnished by the payee in small quantities, not amounting to 20s. at one time. It was urged for the defendant that by the stat. 24 G. 2. c. 40. s. 12. the plaintiff could not recover in this action, and *Mansfield*, C. J. being of that opinion, nonsuited the plaintiff.

*Shepherd*, Serjt., now moved to set aside the nonsuit and have a new trial: he urged that the statute does not, in terms, avoid a security given for the price of spirits sold in small quantities; it only says that no one shall maintain an action for the price: and at all events part of the consideration for the bill, the money lent, is a good consideration; and where a security is given for a good consideration and a void consideration together, the latter will not avoid the security *in toto*.

MANSFIELD, C. J. The statute does not, in terms, indeed avoid the security, but it makes the consideration illegal, not merely void; and the security is entire, and cannot be apportioned; and since it is partly given for an illegal consideration, the whole bill is void.

HEATH, J. Perhaps it might be different, if for part of the amount of the bill there were no consideration.

Rule refused.

THOMP-

## THOMPSON v. WHITMORE.

1810.

Nov. 7.

THIS was an action upon a policy of assurance effected upon the ship *Collingwood*, lost or not lost, at, and from, and to all ports and places whatsoever and wheresoever, at sea and in port, and in all and every service the ship might be ordered, for six calendar months, from the 8th of *February* 1809 to the 7th day of *August* 1810, to return 20s. *per* month for every uncommenced month, on being discharged government service. The plaintiff averred that the ship, by the waves, winds, and perils of the sea, was bilged, strained, broken, and destroyed. Upon the trial of this cause, at the sittings at *Guildhall*, after *Trinity* term 1810, before *Mansfield*, C. J., it was proved, that the vessel, which was in the employ of government as a transport, and was a narrow-floored vessel of 214 tons burthen, had, under the direction of the officers of the transport board, been carefully laid down on *Gosport Beach* to be cleaned and caulked, in a situation where vessels equally narrow-floored, and also vessels of a much greater bulk, therefore much more liable to injury, even of the burthen of 800 tons, had usually been laid down with safety for the same purpose. The ship lay there easy on the first day, when the tide left her; but she was found on the following day full of water, which rose in her with the rising of the circumambient tide: and upon examination it appeared, that the planks of her side on which she lay, had given way, and that some of her foot-hooks were broken. *Shepherd*, Serjt. for the defendant, objected, that this was not a loss occasioned by any perils of the sea, and cited a case of *Rowcroft v. Dunsmore*, B. R. tried in 1801, before Lord *Kenyon*, C. J., in which Lord *Erskine* was of counsel for the plaintiff: the ship was hove down, and while heaving down, she could not bear the strain: she was drawn on the land, where she bilged; and the question was made, whether, it being necessary to perform this operation on her, this damage was occasioned by a peril of the sea. Lord *Kenyon* thought it was not a loss by a peril of the sea, but an accident that happened: so in the present case, whether the ship were laid down negligently or not, she bilged: if the blocks that supported her had fallen down, that also would have been an accident, but certainly would not have been a loss by perils of the sea. *Mansfield*, C. J. thought, that although the tides knocked away the shores which supported the *Collingwood*, and thereby

If a ship hove down on a beach within the tideway, to repair, be thereby bilged and damaged, it is not a loss occasioned by the perils of the sea.

[ 228 ]



1810.  
 THOMPSON  
 v.  
 WHITMORE.  
 [ 229 ]

thereby occasioned the mischief, and although the ship was in the service of the government at the time, and not under the control of the plaintiff, yet as the damage happened upon the land, it could not be considered as a loss sustained by the perils of the sea, and nonsuited the plaintiff, with liberty to move to enter a verdict with 81*l.* 4*s.* damages, if the Court should be of opinion that the plaintiff was, under the circumstances, entitled to recover.

*Lens*, Serjt. on this day moved to set aside the nonsuit, and enter a verdict for the plaintiff; but

The Court were unanimous that the direction of the Chief Justice was right.

Rule refused.

Nov. 8.

BUTLER v. DORANT.

If, upon the judge directing the jury to give nominal damages, the plaintiff elects to be nonsuited, he will not be permitted to have a new trial upon the ground of a misdirection of the judge in that point.

THIS was an action of *assumpsit*, on a special agreement, made on the sale of a share in the secret of making *Barclay's antibilious pills*, whereon the defendant agreed annually to expend 1000*l.* in advertisements; and the breach assigned was, the not having expended that sum. Upon the trial of this cause, at the sittings after *Trinity* term 1810, before *Mansfield*, C. J. and a special jury at *Guildhall*, after the parties had closed their respective cases, the Judge was proceeding, in his summing up, to direct the jury that the plaintiff, not having distinctly proved any special damage arising from the breach, was entitled to nominal damages only; whereupon *Best*, Serjt., for the plaintiff, elected to be nonsuited.

He now moved for a rule *nisi* to set aside the nonsuit and have a new trial, for a misdirection of the Judge.

[ 230 ] LAWRENCE, J. His Lordship did not say you should be nonsuited, he directed the jury that you should have nominal damages only; but you did not choose to trust your case with the jury. If there were a misdirection, you should have abided the verdict, and have reserved the objection for a motion for a new trial. I believe this has never been done, that a counsel shall lie by, until he hears the opinion of the Judge at *nisi prius*, and that if he thereupon chooses to be nonsuited, he shall come to the Court to set aside his own act.

Rule refused.

1810.

Nov. 9.

## CROMPTON v. HUTTON.

THIS was an action for money had and received, and money paid. Upon the trial before *Mansfield*, C. J. at the *Westminster* sittings after *Trinity* term, the case was, that the plaintiff, having been an unsuccessful candidate for a seat in parliament for *Nottingham*, had petitioned the House of Commons, and had summoned the defendant, who was the town-bailiff, and a material witness, to attend and give evidence upon the hearing of that petition. The sitting members had also summoned the same witness. The plaintiff had, by his agents in town and country, paid the defendant fifteen guineas, and the defendant gave him a receipt, expressing it to be for his loss of time, trouble, and expenses, in coming from *Nottingham* to *London* to attend as a witness on that petition, and in returning, eight days. The plaintiff's petition having been voted to be frivolous and vexatious, he was subjected to the payment of the costs of the sitting members, who had paid the defendant, for his attendance given at their instance, as witness on the same occasion, 17*l.* 0*s.* 9*d.* which sum, amongst other items, was allowed by the officers of the House of Commons in taxing the costs, and was therefore paid to the sitting members by the plaintiff. The plaintiff conceiving that the defendant, having altogether received from both parties payment after the rate of 3*l.* 7*s.* 6*d.* per day, over and above the expense of carriages, had received more than any witness was entitled to claim; and contending that the receipt expressed the fifteen guineas to be a full remuneration for all the services which the defendant had performed for either party in the matter of the petition, he brought this action to recover back the 17*l.* 0*s.* 9*d.*, which was last paid to the defendant. *Mansfield*, C. J. thought the plaintiff was not entitled to recover, and nonsuited him, but with liberty to move for a new trial.

*Runnington*, Serjt. now made the application. If the plaintiff's agents had known that the defendant had any claim upon the sitting members, they would never have paid him so much as fifteen guineas. They would have paid him nothing, if they had supposed he was to receive 17*l.* from the other side.

*MANSFIELD*, C. J. It is a very common case that a witness is subpoenaed on both sides, and that each party pays him; and if he receives something from the one side, I suppose he charges less on the other.

If two opposite parties require a witness to attend, and he receives payment from both of them, although the payment made by the successful party is afterwards repaid him by the loser, in the taxed costs, the loser cannot recover back the amount from the witness in an action for money had and received.

[ 231 ]

HEATH,

1810.

CROMPTON  
v.

HUTTON.

HEATH, J. You have given no evidence what was the due reward of his services, or that he has charged too much altogether.

CHAMBER, J. The plaintiff rests merely on the language of the receipt, but is it not explained? The receipt is not inconsistent with the defendant's having a demand on the other party.

Rule refused.

[ 232 ]

SWINNERTON v. Marquis of STAFFORD.

Nov. 9.

Where the circumstances of a case had been fully put into the possession of a jury, who had twice found a verdict the same way, although there was conflicting evidence, and although the judge who last tried the cause, thought the evidence against the verdict preponderated, the Court refused to grant a second new trial.

[ IN this case (a), upon the second trial before *Lawrence*, J. at the *Stafford* summer assizes 1810, a verdict was again found for the defendant. *Lens*, Serjt. now moved for a third trial, upon the ground that the verdict was against the weight of evidence, not only all the former evidence having been confirmed, but an additional fact having been disclosed on the last trial, which was highly favorable to the plaintiff's claim: viz. that in 1791, notice had been given by a public printed hand-bill, that on a certain day *Mothersall* common would be driven, and that the freeholders would impound the cattle of all persons not entitled; but that notwithstanding that notice, which was calculated to challenge an assertion of right by all persons who thought themselves entitled, no stock of *Knight*, the then occupier of *Newhouse* farm, the defendant's estate, was found on the common. He also strongly insisted on the effect of *Knight's* declaration, who, when *Normacott* common was first inclosed in such a manner as to prevent *Knight* from turning his sheep from this tenement into *Mothersall* common through *Normacott* common, as he had been used to do, remarked that he could now get on neither common; in answer to which, his servant advised him to cut an opening through the corner of the fence of his own farm, abutting on *Mothersall* common, which he accordingly did, and erected a wicket there. [*Lawrence*, J. You thought that a cunning trick; I think it an assertion of right; for Lord *Stafford's* tenants had then long given up all right of common upon *Normacott* common: therefore it was no longer commonable, and the sheep being there must consequently attract attention.] The whole balance of evidence is so considerably in favour of the plaintiff, that there ought to be a new trial.

[ 233 ]

(a) See *ante*, p. 91.

MANSTFIELD, C. J. I think it is impossible in this case to grant you a rule. Upon the last occasion we went as far as we could go, because it was an important case, and decided the right to the inheritance of this land, which was to be assigned in lieu of common. On the former trial, *Williams*, Serjt. strongly insisted to the jury on the grant of common to the priory of *Stone*, whose property afterwards came to Lord *Stafford*, and we thought it might have prejudiced the mind of the jury, though it was rejected; if it had been evidence, it would have been decisive of the matter; but we thought the cause not sufficiently understood, and sent it to a new trial. The jury, who are the competent judges, have again had the case before them, and have decided it. Even if, on nicely scrutinizing all the evidence, we had a doubt whether the verdict was right, it could be never right for us to make no weight of two verdicts of a jury, in order to take the chance of a third.

HEATH, J. I am of the same opinion. We cannot grant a new trial without invading the province of the jury. As to the circumstance so much relied on, it might have happened that, at the time of driving the common, the sheep of *Knight* were employed in compestering the fallows. The pinder of *Mothersall*, whose business it is to know every man's cattle, is instructed to impound *Knight's* cattle, and he never does, which is an argument they had no right to impound.

LAWRENCE, J. I cannot say that I should not have been as well pleased if the verdict had been the other way: but the plaintiff's counsel very forcibly put to the jury all the arguments which have been this day insisted on: in particular, he observed, that one instance of interruption was much stronger than much uninterrupted exercise of the right, and he dwelt on the instances of interruption; and in summing up the evidence, I observed, that the remarks of the plaintiff's counsel were very just and weighty. I confess I should have been as well pleased if the verdict had been the other way: but since the verdict is so, and since my Lord Chief Justice and my Brother *Heath* are of opinion that there ought to be a new trial, I may remark, that although the agreement of the prior of *Stone* was rejected as evidence, yet, unless it is imputed that this was a fabricated instrument, it was as near being evidence as could be; and if it had been evidence, it would have bound the rights of the parties, for a person who was then owner of *Newhouse* farm, was a party to that agreement, so that no injustice has been done.

CHAMBRE,

1810.

SWINNERTON  
v.  
Marquis of  
STAFFORD.

[ 234 ]

1810. CHAMBER, J. I am of the same opinion. I think there is nothing like sufficient ground for the Court to interfere to set aside this verdict. The circumstances have already been sufficiently commented on, and therefore I need add nothing.

SWINNERTON  
v.  
Marquis of  
STAFFORD.

Rule refused.

[Nov. 12.]

## ARROWSMITH v. INGLE.

Delivery of process, sealed up in a letter, in the absence of the person to whom it is addressed, is no service but

[ 235 ]  
from the time when the letter is opened.

CLAYTON, Serjt. had obtained a rule *nisi* to set aside the proceedings in this case, for irregularity: the fact was, that the process was sent to the house of the attorney for the defendant, sealed up in a letter, which was addressed to the attorney, and was delivered there before nine o'clock at night; but as the attorney was then absent from home, and continued absent until after nine o'clock at night, this was not a service before nine o'clock, and was therefore equivalent to no service for that night.

Vaughan, Serjt. endeavoured to support this as good service, but

The Court held that this was no service: if the letter had been open, a clerk might see what were the contents, and proceed in the cause accordingly: but the letter being sealed up, he probably would not dare to open it, and therefore it gave no notice of the action.

Rule absolute.

Nov. 12.]

## MORELL v. DUBOST and SONNERAT.

It is not sufficient that the defeazance of a warrant of attorney shews the amount of the sum secured by the judgment, it must also notice all collateral securities by which it is secured.

SHEPHERD, Serjt. had on a former day moved for a rule *nisi* to set aside the warrant of attorney which had been given in this case, and the judgment entered up, and execution issued and executed thereon, upon the ground of non-compliance with the rule of Court, of *Michaelmas*, 43 *Geo. 3.*, which requires, that upon preparing any warrant of attorney, subject to, a defeazance, the defeazance shall be written upon the same paper or parchment upon which the warrant of attorney shall be written, or that a memorandum in writing shall be made on such warrant, containing the substance and effect of such defeazance. In the present case the defeazance purported to be merely

merely for avoiding the judgment upon payment of 240*l.*, whereas the transaction, as it appeared on the affidavits, was this: The defendant *Dubost*, being indebted to the plaintiff in 240*l.*, a written agreement was entered into, that he, and the other defendant, should give their acceptances for 240*l.*, and should also deposit in the plaintiff's hands a valuable picture, with power for the defendant to sell it in case the acceptance should not be duly paid, and to retain the proceeds in part-payment of the debt; but the defeazance mentioned nothing of this latter security. The picture had been sold for 160 guineas, and the plaintiffs had moreover levied in execution 122*l.* 10*s.* The Court granted the rule *nisi*, and engrafted on it the terms, that the plaintiff should produce the agreement, which was in his custody; that the Court might see how far it corresponded with the defeazance.

*Best*, Serjt. now shewed cause against the rule. He said it was sufficient, if it appeared on the defeazance, as here it did, what was the amount of the debt, and what were the terms on which the plaintiff was entitled to enter up judgment and sue out execution.

MANSFIELD, C. J. No doubt the defeazance ought also to have stated the other part of the agreement, that if the money was not paid at the day stipulated, the picture should be sold, and the proceeds applied in part-payment of the debt, and that the judgment should afterwards stand in force for the residue only. The meaning of the rule is the same, as the intent of a part of the annuity act, that it may appear upon what terms the judgment shall be entered up and execution taken out: it is a clear and gross irregularity.

*Shepherd*, in support of the rule.

Rule absolute.

---



---

### WINSTANDLEY v. HEAD.

[ 237 ]

Nov, 12.

**T**HIS was an action of debt upon a simple contract. The defendant pleaded first, the general issue; secondly, for a further plea in discharge of the person of the defendant from any execution to be had against his person in this action, he pleaded his discharge out of the *Fleet* prison, by virtue of the stat. 46 G. 3. c. 108., intituled an act for the relief of certain insolvent

sworn to by the defendant in the oath which he took, as required by the statute, in order to obtain his discharge, without singling out any in particular: held that although this mode of pleading might be bad on a special demurrer, it did not tender an immaterial issue.

To a plea of discharge under an insolvent debtor's act, the plaintiff replied by denying the truth of all the facts collectively, which were

debtors,

1810.  
 ———  
 WINSTAND-  
 LEY  
 v.  
 HEAD.

[ 238 ]

debtors, and that the causes of this action had accrued before his discharge. The plaintiff replied, that the defendant, in order to obtain his discharge, in pursuance of the said statute, did, on the occasion in the plea specified, solemnly swear that the schedule then delivered by him, and subscribed, (meaning the schedule required by the said act to be by him in that behalf delivered,) did contain, to the best of his knowledge, remembrance, and belief, a full, just, true, and perfect account and discovery of all the goods, effects, and estates, real and personal, in possession, reversion, remainder, or expectancy, and of every other nature and kind whatsoever, which he, or any person in trust for him, or for his benefit or advantage, were seised, or possessed of, interested in, or entitled to, or was, or were, in his possession, custody, or power, or in the possession, custody, or power of any such person as aforesaid, or which he, or such person had any power of disposing of, or charging for his benefit or advantage at any time since his commitment to prison; and of all debts to him owing, or to any person or persons in trust for him, and of all the securities and contracts whereby any money then was, or should or might thereafter become payable, or any benefit or advantage, which might accrue to him, or to his use, or to any person or persons in trust for him, and the names and places of abode of the several persons, from whom such debts were due and owing, and of the witnesses who could prove such debts or contracts; and that neither he, nor any other person or persons in trust for him, or his use, had any lands, money, stock, or any estate, real or personal, in possession, reversion, remainder, or expectancy, or of any nature or kind soever, or power of disposing of, or charging, for his benefit or advantage, other than what were in the said schedule contained, except wearing apparel and bedding for himself and family, working tools, and necessary implements for his occupation and calling, together with a sum of money not exceeding 5*l.*, and these in the whole not exceeding the value of 30*l.* And further, that the said oath, as sworn and taken by the defendant, was not true; but was false in this, to wit, that the said schedule so subscribed and delivered by the defendant, did not contain to the best of the defendant's knowledge, remembrance, and belief, a full, just, true, and perfect account and discovery, of all the goods, effects, and estates, real and personal, in possession, reversion, remainder, or expectancy, and every other nature and kind whatsoever, which he was possessed of, interested in, and entitled

entitled to, and which were in his possession, custody and power, and which he had power of disposing of, and charging for his benefit and advantage, at any time since his commitment to prison aforesaid; and of all debts to him owing, and to any person or persons in trust for him, and of all the securities and contracts, whereby any money then was and thereafter became payable, and every benefit and advantage which might accrue to him, and to his use, and the names and places of abode of the several persons from whom such debts were due and owing, and of the witnesses that could prove such debts and contracts; and that he then had money, stock, and estate personal, in possession, and in expectancy, other than what are in the said schedule contained, and over and above wearing apparel, and bedding for himself and family, working tools, and necessary implements for his occupation and calling, together with a sum of money not exceeding 5*l.*, and these in the whole not exceeding the value of 30*l.* The defendant, protesting that the said replication was wholly insufficient in law, and untrue in fact, rejoined, that he at the time of making and taking the said oath, or his commitment to prison, as in the said replication mentioned, had not money, stock, or estate personal, in possession, or expectancy, other than what were in the said schedule contained, and over and above wearing apparel and bedding for himself and family, working tools, and necessary implements for his occupation and calling, together with a sum of money not exceeding 5*l.*, and those in the whole not exceeding the value of 30*l.* in manner and form as the plaintiff had in his replication alleged. Upon this traverse, issue was tendered and joined. Upon the trial of this cause at a sittings at *Westminster*, in *Easter* term 1810, before *Mansfield*, C. J., it appeared that the defendant was possessed of a debt of 3*l.* above the 5*l.* mentioned in this schedule, and thereupon a verdict was found for the plaintiff upon this issue.

*Vaughan*, Serjt., on the following day, by permission reserved to him at the trial, moved for and obtained a rule *nisi* for setting it aside, and entering a verdict in favour of the defendant upon the last plea, notwithstanding the verdict, and notwithstanding any error that the plea might contain, upon the ground that the replication was bad.

*Frere*, Serjt., in this term, shewed cause. The replication is correctly pleaded, inasmuch as it disaffirms the truth of all the several allegations of the oath, taken collectively, in the same.

1810.

WINSTAND-  
LEY  
v.  
HEAD.

[ 239 ]

[ 240 ]



1810.  
 WINSTAND-  
 LEY  
 v.  
 HEAD.

same manner in which they are sworn, it moreover proceeds to particularize property which the defendant possessed, and which he did not include in his schedule; the defendant by his rejoinder has denied that he had any such property, and upon issue joined hereon, the jury have found that he had such property; a material fact therefore has been put in issue, which being found for the plaintiff, is, according to the statute, decisive against the personal discharge of the defendant. There is no ground therefore for the present motion.

*Vaughan and Peckwell*, Serjts. in support of the rule. The replication is too loose and general. If the plaintiff meant to reply specially, he ought to have pointed out by his replication the precise facts on which he relied for disproving the plea. But the question does not arise here on a demurrer; the only point is, whether the issue be material or immaterial.

MANSFIELD, C. J. If there are in the pleading the defects of which you complain, you might have taken advantage of them by a special demurrer.

LAWRENCE, J. The issue found by the jury is not an immaterial issue: the words of the replication are very general, that the oath was not true; and perhaps if you had demurred specially, for uncertainty, you might have succeeded, but you cannot succeed on this rule.

The rest of the Court concurring, the rule was discharged.

---

[ 241 ] MORGAN and Others, Assignees of CHARLES HENRY  
 Nov. 15. HUNT, a Bankrupt, v. HORSEMAN and Others.

A deed whereby a debtor, being pressed, conveys estates in trust to sell, and to pay the pressing creditor, with a further trust to pay his debts to certain relatives, in order to give them an undue preference in contemplation of bankruptcy, is an act of bankruptcy.

But the deed is valid, so far as relates to the protection of the urgent creditor.

Whether void for the residue, *quære*.

Upon a case directed out of Chancery, the Court will not solve any questions that are not expressly put in the case.

THIS was a case directed by order of the Lord Chancellor for the opinion of this Court; the question put, was whether an indenture executed by *Charles Henry Hunt*, was an act of bankruptcy. The deed was executed on the 4th of July 1797, and was made between the bankrupt *Hunt*, of the one part, and the defendants *Edward Horseman*, *Edmund Battersbee*, *John Horseman*, and *Thomas Hunt*, of the other part; and recited that *C. H. Hunt* being indebted to the defendants, and to divers other persons, in different sums of money upon mortgage and being also indebted unto the defendants in 6000*l.* and up

wards

wards, for bills, drafts, or promissory notes in their possession, unpaid; and being also indebted to his mother *Catherine Hunt*, and his sister *Catherine Maria Hunt*, in 1000*l.*, for money lent and advanced; and being desirous that those respective sums might be paid, had proposed to the defendants, in consideration of the money due to them, and of their delivering up to him the said bills, drafts, and notes, to the amount of the said sum of 6000*l.*, and also in consideration of the name of the said *Thomas Hunt*, (who was the brother of the said *C. H. Hunt*,) being erased from the bills or notes then in the possession of the said *Horseman*, *Battersbee*, and *Horseman*, (who were at that time bankers at *Stratford-upon-Avon*,) to convey and assure unto them, and the said *T. Hunt*, and their heirs, the hereditaments thereafter mentioned, upon the trusts thereafter expressed; and for the considerations aforesaid, the said *C. H. Hunt* did thereby convey and assure unto the defendants and their heirs, the manors, lands, and hereditaments therein mentioned, in the counties of *Worcester* and *Warwick*, upon trust that the defendants, or the survivors or survivor of them, or his heirs, should, as soon as conveniently might be, absolutely sell and dispose of the same; and should, until such sale, receive and take the rents thereof; and out of the monies to arise by such sale, and by the rents and profits, should pay off and discharge the several sums of money due and owing from the said *C. H. Hunt* to the several persons therein mentioned, and that after payment thereof, the defendants should retain to themselves, out of the purchase-money, a sum of 10,000*l.*, and interest, in the said indenture mentioned to be due to them upon mortgage, and also the sum of 6000*l.*, due to them for principal and interest, upon the bills, drafts, and promissory notes, in their custody; and likewise the sum of 1000*l.* to his mother *C. Hunt*, and his sister *C. M. Hunt*, and that they should deliver up to him the said *C. H. Hunt*, the same bills, drafts, or promissory notes, so erased as aforesaid; and after payment of, and retaining the respective sums of money in the said indenture mentioned, should pay the residue of such trust-monies unto the said *C. H. Hunt*, his heirs, executors, administrators, and assigns. The provision in the deed in favour of *Horseman* and *Battersbee*, was made fairly, in consequence of their pressure, and from fear of hostile measures being pursued by them; but the other provisions in favour of the mother, of the brother, and of the sister, were voluntary, and made by the said *C. H. Hunt*, to give them a preference

1810.

MORGAN  
and Others  
v.  
HORSEMAN  
and Others.

[ 242 ]

1810.

MORGAN  
and Others  
v.  
HORSEMAN  
and Others.

[ 243 ]

preference in contemplation of bankruptcy, and were fraudulent.

*Vaughan*, Serjt., for the plaintiffs, contended that this was an act of bankruptcy for two reasons, first, that it was such upon the plain letter of the statute 2., *vulgo* 1. *Jac.* 1. *c.* 15. *s.* 2.; secondly, that it was such upon the general policy of the bankrupt laws, as a fraud upon all the other creditors. First, it was a fraudulent grant or conveyance of the bankrupt's lands and tenements, to the intent, or whereby, his creditors should or might be defeated or delayed. If it be to the intent, it is sufficient; it is not necessary that creditors should be thereby actually delayed. Nor is it now held necessary that it should be a conveyance of all the bankrupt's property. [*Mansfield*, C. J. agreed that though in *Wilson v. Day*, 2 *Burr.* 831., the Court countenanced the idea that nothing but an assignment of the whole would be deemed an act of bankruptcy, that was not now held a necessary ingredient.] Any act under seal, whereby a part of the creditors are to be excluded, is now held an act of bankruptcy. *Linton v. Bartlett*, 3 *Wils.* 47. is cited in the case of *Rust v. Cooper*, *Cowp.* 633. by Lord *Mansfield*, C. J. as a decision in which "a conveyance of a third part of the bankrupt's effects only, and a fair transaction with the party, was held to be fraudulent and void, as against the rest of the creditors, and that being by deed, it was itself an act of bankruptcy." [*Mansfield*, C. J. stopped him, observing that it was unnecessary to cite cases to shew that every deed of assignment of part of a man's property, whereby his creditors may be defeated or delayed, is an act of bankruptcy.]

[ 244 ]

*Rough*, Serjt. was called upon to argue for the defendants. He admitted the law to be such as contended for, but said that the object of this case was to raise a further question. The matter arose upon a bill filed against the defendants to have this deed delivered up to the plaintiffs to be cancelled; but since the case itself expressly states that the first provision in the deed, in favour of *Horseman* and *Battersbee*, was not fraudulent, they were entitled to retain the custody of this deed for their own benefit and protection. Deeds void as to certain provisions, because those provisions are repugnant to a statute, have been supported as to other uses; *Kerrison v. Cole*, 8 *East*, 231. And Lord *Ellenborough*, C. J. there praises the case of *Mowys v. Leake*, 5 *T. R.* 411., which decided the same point with respect to a deed void under the stat. 13 *Eliz. c.* 20., as being founded on  
admirable

admirable good sense and sound law. From *Twyne's case*, 3 Co. 90. downwards, there has been no case exactly parallel to this. Where the primary purpose of a deed has been fraudulent, though coupled with an honest trust, the trust has not prevailed to give effect to the deed, but the primary purpose of this deed is correct, and the fraudulent provisions are added without the knowledge of *Horseman* and *Battersbee*. [*Lawrence*, J. You are labouring that which is clearly in your favour, that with respect to *Horseman* and *Battersbee*, the deed shall stand as a fair deed; but is not your point this, that the fairness of the deed as to them, obliterates the fraud of the other provisions?] *Bacon's Maxims*, Reg. 22. p. 98.: *non videtur consensum retinuisse, si quis ex præscripto minantis aliquid immutavit*. Here the bankrupt, being pressed by *Horseman*, says, I will give you the deed which you ask, but you must let me insert a provision for my relatives. If one is urged under duress to give a bond for 50*l.*, and says, no, I will not give that, but I will give a bond for 20*l.*, the bond for 20*l.* is still given under the same duress. *Bac. Max.* 98. *Mowys v. Leake* is strong for this construction. [*Lawrence*, J. That case amounted only to this, that on the annuity act, the Court had no authority to direct the deeds to be delivered up.] It established thus much, that a deed void by statute may be void in part only. [*Lawrence*, J. That is contrary to the doctrine of *Collins v. Blantern*, 2 Wils. 351., where *Wilmot*, C. J. following *Hobart*, likens the statute to "a tyrant, where he comes, he makes all void; but the "common-law," he says, "is like a nursing father, makes "only void that part where the fault is, and preserves the "rest."]

**MANSFIELD**, C. J. It is impossible for this Court to look at any thing but the case referred to it by the Court of Chancery; and it has no authority to give any opinion on any thing but the question put by the Lord Chancellor; therefore, as to the question last raised, we have no authority to give any opinion. The question put to us, is, whether this is an act of bankruptcy; a conveyance, either of all, or part of a man's property, in favour of fewer than all the creditors, is an act of bankruptcy, because it is the means whereby the creditors may be defeated or delayed. This deed is an assignment of the grantor's real estates in two counties, *Worcester* and *Warwick*, to the defendants, in trust, to sell, and out of the proceeds, after payment of certain debts, due to others and themselves, to pay the grantor's mother and sister,

VOL. III.

N

each

1810.

MORGAN  
and Others  
v.  
HORSEMAN  
and Others.

[ 245 ]

1810.

MORGAN  
and Others  
v.  
HORSEMAN  
and Others.

each 1000*l.* Is not this then a gift of estates to the value of 1000*l.*, to each of these persons, the mother and sister, to satisfy their claims and pay their debts, and so put those sums out of the reach of all other creditors? It is impossible therefore to say that this is not an act of bankruptcy. As to the question what may be the effect of these provisions on the rights of the *bond fide* purchasers under this deed, we have no authority to inquire: it may be a very proper point for the Lord Chancellor to consider either in law or in equity, but we have no authority whatsoever to consider it.

The following certificate was afterwards sent to the Lord Chancellor.

[ 246 ] Having heard the arguments of counsel upon this case, we are of opinion that the indenture of the 4th of *July* 1797, executed by the said *Charles Henry Hunt*, was an act of bankruptcy.

J. MANSFIELD.

J. HEATH.

S. LAWRENCE.

A. CHAMBRE.

Nov. 15.

SMITH v. SPOONER.

In an action for slander of title it is necessary for the plaintiff to prove malice in the defendant.

A lease, in which was a proviso for re-entry if the rent were in arrear 28 days, being exposed to sale by the assignee, and rent being then in arrear, the lessor announced at the sale that the vendors could not make a title, in consequence of which, bidders, who came to buy, went away. He afterwards offered 100*l.* for the lease, but subsequently recovered the premises in ejectment: held that no action for slander of title lay against him.

If the lessee covenant, that if the rent be unpaid 28 days, the lessor may re-enter, whether a demand of rent be first necessary, *quære*.

In an action for slander of title, the defendant may give evidence on the general issue, that he spoke the words claiming title in himself.

ment.

ment. It was proved that the plaintiff, in the month of *August* 1809, exposed to sale by auction his unexpired term in the premises, and that at the time of the sale, when this lot was put up, the defendant was present, and told the auctioneer it was of no use to sell the lot, or put it up; the house was his own, he was the landlord of it, and no title could be made to it. Some other persons were there present, who said, they had come to bid for this lot, but rather than involve themselves in a lawsuit, they would go away without bidding for it. The auctioneer and the defendant then went into another room, where the defendant said he would buy the house: he offered 100*l.* for the lease: but the auctioneer said he had no authority to sell it otherwise than by public auction. The defendant had, two or three weeks before the auction, applied to the auctioneer for the purchase of the lease. The auctioneer told the defendant he thought he was liable to the expenses of the auction, to which he answered, that he would rather pay ten pounds than that the plaintiff should sustain any injury. The expenses of the sale amounted to 6*l.* 8*s.* At that time there was half a year's rent due and in arrear, and certain parts of the premises were out of repair, and the defendant had complained of it: at the time of the trial the defendant was in possession of the premises, and it was proved that the plaintiff's attorney had recently, in the month of *May* preceding, tendered the defendant the payment of five quarters of a year's rent, which was in arrear, and the costs of the ejectment under which he had obtained possession of the premises, if the defendant would give back the possession. The declaration in ejectment had been served upon *Francklin* only, and not upon the tenant in possession; the house being at the time of the service shut up and uninhabited. *Best*, Serjt. for the defendant, objected that the plaintiff could not recover upon this evidence, because there was no proof of malice in the defendant, and according to the case of *Hargrave v. Le Breton*, 4 *Burr.* 2482, in order to support this species of action, there must be proof of malice, either express or implied. 4 *Co.* 18. *Sir G. Gerard v. Mary Dickenson*, 1st res. "If the defendant had affirmed that the plaintiff had no right to the castle and manor of *H.*, but that she herself had right to them, in that case, because the defendant herself pretends right to them, although in truth she had none, yet no action lies. For if an action should lie when the defendant herself claims an interest, how can any make claim or title to any land, or begin any suit, or

1810.

SMITH

v.

SPOONER.

[ 247 ]

[ 248 ]

1810.  
 —  
 SMITH  
 v.  
 SPOONER.

seek advice or counsel, but he should be subject to an action? which would be inconvenient." Here, although in fact no re-entry was given by the lease, upon the ground of the premises being out of repair, yet it is very probable that the defendant, who, it seems, complained of that defect, supposed that a re-entry was thereupon given, and if he so thought, that alone would be sufficient to repel the inference of malice. and if that had been indeed a breach of condition, the plaintiff could not have obtained relief, even in a court of equity, to re-establish his title to the lease. The rent, however, was in arrear at the time of the sale, which is proved by the plaintiff's offer of paying the rent with the costs of the ejectment: whether the defendant has obtained a regular judgment in ejectment or not is immaterial, for inasmuch as the rent was in arrear, the title of re-entry had accrued to the defendant, which sufficiently bore him out in saying that the plaintiff had no right to sell. *Pell, Serjt.*, for the plaintiff, urged, that if a person is about to sell property, and another, by any means whatsoever, impedes him in selling it, an action lies. The opposite principle contended for goes so far, that if one person were about to sell a chattel, as a horse, another might with impunity charge the seller with felony, in having stolen the horse, if he only took care at the same time to claim the horse as his own, although he had no property in it whatever. *Chambre, J.* was of opinion that words of this sort must be proved to be spoken either through express malice, or under circumstances from which malice may be implied; and he thought there were some circumstances here which rendered it improper to withdraw the case from the consideration of the jury. He directed the jury that any man who has, or supposes he has, a title to an estate, may assert his own title, unless malice is proved to have been his motive. Some of these circumstances were rather suspicious; it did not appear that until the defendant had quitted the auction room, he said any thing about his own right; he only denied the plaintiff's right to sell; and it seemed something like an admission of the plaintiff's right, that he had offered a sum for the purchase of the lease: it appeared, however, that a re-entry was given upon the non-payment of rent, and that the rent had been in arrear, wherefore, the whole of the evidence, taken together, disaffirmed the idea of malice. It was moreover observable, that by the form of the condition used in this lease, it was not necessary to demand the rent in case of a re-entry; it was not like those leases in which the re-

entry

entry is given 28 days after demand made, but the re-entry here was given in case the rent should in any event be in arrear by the space of 28 days. Liberty was reserved to the defendant to take the benefit of his objection, by moving to enter a nonsuit, in case the verdict should pass for the plaintiff. The jury found a verdict for the plaintiff, with 6*l.* 8*s.* damages.

*Best*, Serjt. in the following term obtained a rule *nisi* to set aside the verdict and enter a nonsuit, upon the ground that at the time of the sale there was rent arrear, and no express malice proved, and that where a defendant has even a colour of title, this sort of action cannot be supported; upon which occasion *Mansfield*, C. J. asked, inasmuch as there was rent arrear, how a man could suffer damage by slander of title, who had no title; and *Chambre*, J. said, that after the trial, when he found how obstinate the jury were, he had repented that he had not nonsuited the plaintiff: but at first he thought there was some show of malice, since the defendant had first endeavoured to purchase the lease, and after the sale had offered to purchase it at a lower rate; nevertheless that he was afterwards convinced that those grounds were insufficient.

*Erere*, Serjt. (*Pell*, who was with him, being confined by illness,) now shewed cause. He contended that the defendant's treaty with the plaintiff for the purchase of the lease was a waiver of all forfeitures that might have been previously incurred; (but *Mansfield*, C. J. held that a man may well offer a small sum for that which is his own, rather than incur the trouble of going to trial to recover it.) If the defendant asserts that the plaintiff has no title, the *onus* lies upon him to prove it. And the only proof given is, of a flaw in the plaintiff's title at the time of the action brought, not of the words spoken: at the time of the act complained of, the plaintiff had the possession of the premises, and possession is a sufficient title against a wrong-doer. [*Mansfield*, C. J. A pretty strong presumption must be made, to enable you to avail yourself of that argument; for until it is first shewn that the plaintiff had a title, the defendant is not a wrong-doer.] The defendant is not entitled to avail himself of the answer that he claims title in himself, under the plea of the general issue which he has pleaded. That plea is, that he did not use the expressions, whereas his answer ought to have been, that the statement made is true, that the plaintiff had no title. This species of action is of rare occurrence: but in all other cases of slander it is of daily practice, that if the

1810.

SMITH  
v.  
SPOONER.

[ 250 ]



1810. the defendant justifies the slander, he must specially plead his \* justification. [*Lawrence*, J. Was not the plea in *Hargrave v. Le Breton* the general issue, in which the like defence prevailed?] There the circumstances were very different: the defendant explained his whole objection to the title; here the defendant only throws out a dark innuendo, and never shews what his title was. [*Lawrence*, J. referred to the case of *Sir G. Gerard v. Mary Dickenson*.] In *Cro. El.* 196. the declaration in the same case is reported, and it charges no malice, yet the plaintiff succeeded, although the defendant made a claim of right. Therefore it is not true that no action is maintainable where the defendant claims an interest. [*Mansfield*, C. J. That position may not perhaps be supported to the full extent: if a man knows that he has not a title, and maliciously asserts that he has, perhaps it would not serve; but where there is a *bonâ fide* assertion of title, it is sufficient.] There was no proof of any demand of rent, nor of any re-entry having been made before the sale: without a demand on the 28th day, the defendant had no title of re-entry, consequently the plaintiff's title was at that time good. *Doe d. Forster v. Wandlass*, 7 *T. R.* 117. For this proviso does not make the lease absolutely void upon the non-payment of the rent, it only gives a power of re-entry, and in order to exercise that, all the formalities of a demand on the 28th day, and of a re-entry, must be previously observed. [*Mansfield*, C. J., and *Heath and Chambre*, Justices, denied this. *Chambre*. If the proviso made the lease actually void, some sort of re-entry would be equally necessary to indicate the lessor's will to determine it.] *Duppa v. Mayo*, 1 *Williams's Saunders*, 287. note 16.; all the authorities are there collected. [*Mansfield*, C. J. You need not labour that point, that in the case of a re-entry upon condition for non-payment of rent according to the reddendum, a demand and several other formalities are necessary. Those points are all perfectly well known, and laid down, *Co. Litt.* 201. *Lawrence*, J. adhered to the doctrine of *Doe v. Wandlass*, that a demand was necessary here.] The statute 4 *Geo. 2.*, it is true, dispenses with these formalities, but the defendant has not brought himself within that statute; and the words of that act confirm the doctrine, that at common law both a demand and re-entry are necessary. [*Lawrence*, J. Re-entry is now necessary in no case but to avoid a fine.] Even if the proviso had been that the lease should be absolutely null and void, a demand

mand of the rent would have been necessary: so a rent *in nomine pœne* cannot be enforced until a demand of the original reserved rent has been made. 1 *Rô. Ab.* 459. *Co. Lit.* 202. a. [Mansfield, C. J. Lord Kenyon, C. J. certainly lays it down very unreservedly in *Doe v. Wandlass*, that on a proviso for re-entry, there must be a demand and all the formalities attendant upon a condition broken; but the common import of these words is, that "if I do not pay you your rent within the 28 days, you shall re-enter:" and within the 28 days the tenant must find out his landlord, though he be 200 miles off, if he is within the four seas, and pay him his rent, otherwise his estate is voidable: but I do not think the case turns upon this point, nor do I agree that the *onus* of proof is on the defendant.] Next, admitting that the defendant could justify some slander, he cannot justify the terms he has made use of. *Cro. El.* 427. pl. 28. *Pennyman v. Rabanks. S. C. Mo.* 410. pl. 558. The words spoken upon a sale were, "I know one that hath two leases of his land, who will not part with them at any reasonable rate;" and the defendant justified by reason of leases made to himself, and upon verdict for the plaintiff, and motion in arrest of judgment, the Court held the plea bad. So *Earl of Northumberland v. Byrt, Cro. Jac.* 163. The plaintiff declared that the defendant said, "The late Earl of *Arundel*, lord of the manor of *Hazelbert Brian*, did make a lease of my tenement in *Hazelbert* to one Mr. *Stoughton* for 60 years, to begin after the expiration of my customary estate, &c. and the same is a good lease;" *ubi reverâ*, the said Earl of *Arundel* did not make any such lease. This defendant justified, that the earl made such a lease, and that *Stoughton* assigned to the defendant, wherefore, for maintenance of his title he spoke these words. Upon a replication, *de injuriâ suâ propriâ*, and issue joined thereon, a verdict was found for the plaintiff; and it was moved in arrest of judgment, upon the ground that he justifying the words by reason of the assignment of the lease, and in maintenance of his own title, an action lay not: *sed non allocatur*: for in his words he doth shew that he spake them for himself, and in maintenance of his own title; for it is lawful for every one to speak in countenance and maintenance of the title which he claims: but the words in themselves import that he spake them to countenance the title and interest of a stranger, which is not lawful. And now, when he is sued to be punished for them, (they being false as is pretended,) he cannot excuse himself by entitling

1810.

SMITH  
v.  
SPOONER.

[ 253 ]

1810.  
 ———  
 SMITH  
 v.  
 SPOONER.

[ 254 ]

entitling himself, when the words did not at first import as much." [All the Court agreed, that in both of these cases the pleas were no otherwise bad, than because they were false, and not consonant to the facts; so that the issues were properly found against the defendants.] The reasons there given are good, and are founded on good sense, and in this case, if the lessor had explained the grounds on which he conceived himself entitled to re-enter, the auctioneer, who exposed the premises to sale upon the terms of the vendor's clearing off all incumbrances to *Michaelmas* 1809, would immediately have healed the defect of title, by tendering to the defendant his rent up to the time of the sale, and the costs of the ejectment; after which the title of the vendor would have been good again. *Mildmay's case*, 1 *Rep.* 177. it was held that an action might be maintained for insisting on that as a lease, which was so doubtful, that the Court hesitated whether it were a lease or not. That indeed was the case of words spoken by a person not interested in the property. In *Hargrave v. Le Breton*, the Court thought that the weight of the evidence disaffirmed the presumption of malice: but this defendant, so far from going to prevent the lease from being sold, goes with an intention to purchase it himself, and offers 100*l.*, an inferior consideration, for that which he knew to be of value. The question of malice has been submitted to the jury, and they have affirmed it.

*Best*, Serjt., *contra*, was stopped by the Court.

MANSFIELD, C. J. The ground of this action is, that the defendant is supposed falsely and maliciously to slander the title of the plaintiff. Here is an auction, and the plaintiff's estate is put up; it does not appear whether the plaintiff was present: the auctioneer, as agent for the vendor, probably knew something of the estate: the defendant says, the plaintiff cannot make a title; the auctioneer asks no questions; if he had asked, and the other had affirmed something false, it might have been different: it does not appear how the persons came to disperse; for, generally, persons attending a sale would not disperse on the word of a stranger; but it was said by the counsel that there were only two or three persons there present. At the time of the trial, the defendant was in possession of the premises; but it does not appear how; the plaintiff however knew how, and might have explained it by evidence, and except for the lease, upon which the plaintiff was entitled to equitable relief,

lief, the defendant had then, in fact, as good a title as he had before he had demised. Stopping here then, what evidence is there of malice? What evidence that \*the plaintiff meant any thing more than to assert his right to that possession, which he afterwards obtained before the cause was tried? On the part of the plaintiff is not said, the defendant ought to prove his title: that is not necessary; for pretty strong cases say, that if a defendant says *he* has title to an estate, no action will lie against *him*, therefore it cannot be incumbent on him to prove his title. But it is objected, that supposing this was a case where a claim of title in the defendant might be a ground of defence, yet he cannot give it in evidence on a plea of the general issue. That however is directly opposite to the case of *Hargrave v. Le Breton*, where the general issue was pleaded: but, according to common sense, it cannot be necessary to plead specially. He alleges that the defendant has slandered his title maliciously; if he had no title, he had nothing to be slandered. The slander also must be malicious, and what proof of malice is here? I think the rule must be made absolute for a nonsuit.

HEATH, J. I am of the same opinion. There is no pretence of express malice, and as little proof of implied malice.

LAWRENCE, J. I am of the same opinion. An action can only be maintained where the words are spoken maliciously. It is not necessary to plead specially, it is for the plaintiff to prove malice, which is the gist of the action, and is a part of the declaration important to be proved by the plaintiff. The specially pleading a justification would admit the facts stated in the declaration, and amongst others the malice. Now as to the facts, what is this case? A man thinking he has a right to recover possession of a term for some misconduct of his tenant, and hearing the term is to be sold, goes to the auction, and says, the vendor cannot make a title; now does not he act herein as an honest man? What would have been said, if he had lain by, and permitted another to purchase it, before he disclosed his claim? The rule therefore must be made absolute for a nonsuit.

CHAMBRE, J. concurring,

The Rule was made absolute.

1810.

SMITH

v.

SPOONER.

[ \*255 ]

[ 256 ]

1810.

Nov. 21.

## DAWSON v. WOOD and Others.

The plaintiff having purchased a public-house, for which he could not himself obtain a licence, because he resided in another tavern, put B. an insolvent person, into the house as his servant, to keep it for him, and supplied him with money to pay for the licence, which was granted to B. Held that the sheriff was not entitled to take, under an execution against B., the plaintiff's liquors and chattels in the house, committed to B.'s custody.

[ 257 ]

THIS was an action of trespass, brought against the sheriffs of London, their officers, and the plaintiff, in an execution against *Pyke*, for taking the liquors and effects in the *Pitt's Head* public-house in the *Old Bailey*, and detaining them until they compelled the plaintiff to pay 66*l.* 13*s.* to procure their liberation. Upon this trial at the sittings after the last *Trinity* term at *Guildhall*, before *Mansfield*, C. J., it appeared that the plaintiff had purchased the lease and fixtures of this house by appraisement from *Vinall*, a former tenant, that the plaintiff now paid the rent for it to his landlord, who was a brewer, and supplied him with beer, the money for which he received of the plaintiff at another tavern, which he kept in *Mitre-Court*: that the plaintiff also purchased all the liquors and provisions that were consumed in the house; and that all the tradesmen who furnished any part thereof, gave credit to him alone. It was proved to be the practice among the city magistrates, not to grant a licence to any person to sell beer at any house at which he did not reside, and not to grant two licences to the same person to sell beer at two public-houses within the same ward of the city; in consequence of which rules, the plaintiff, who had another public-house within the same ward wherein this house stood, caused *Pyke* to take out the beer licence in his own name, and supplied him with money for that purpose: the beer licence had before the present year been taken out in the name of *Hindley*, who was a waiter of the plaintiff's at his tavern in *Mitre-Court*, and who then resided in this house, but did not keep house on his own account, and the wine and spirit licences granted to *Hindley* for this house were still in force at the time of the execution levied, and his name then still continued on the door. *Pyke*, who had then lately been discharged out of the *Fleet* prison under an insolvent act, was put into the house by the plaintiff to manage it; he slept there, he had no wages, but a mere subsistence; he paid the taxes, and the brewer's demands for beer, with money taken out of the till on the plaintiff's account. All the surplus of the money received from the sale of liquors, after defraying necessary expenses, was paid over by *Pyke* to the plaintiff. The defendants took the goods in execution under a judgment for a debt due from *Pyke* before his discharge, but restored them on payment by the plaintiff of the

the debt and costs, amounting to 66*l.* 13*s.* *Mansfield*, C. J. thought, that though the plaintiff furnished the money for carrying on the business, the liquors and beer machines taken were yet to be considered as the stock in trade of *Pyke*, who was carrying on this trade; and that if this were not so, a fraud would be successfully practised on the police and the justice of the country, which had no security from the person from whom they ought to have it, for the good keeping of this house, and also a fraud upon every person who dealt with *Pyke*, by giving him an appearance of possessing property: and as there was not in this case the question to be left to the jury which usually arises, whether a fraud had been practised on any creditor, he nonsuited the plaintiff.

1810.   
 ———   
 DAWSON   
 v.   
 WOOD   
 and Others.

*Best*, Serjt. having on a former day in this term obtained a rule *nisi* for setting aside the nonsuit, and entering a verdict for the plaintiff for 66*l.* 13*s.* damages;

[ 258 ]

*Cockell*, Serjt. shewed cause. He contended that inasmuch as it appeared that the plaintiff lent *Pyke* the money to procure the licence, this was a case of gross fraud: and he argued that it was similar to the case of *Lingham v. Biggs*, 1 *Bos. & Pull.* 82. [*Heath* and *Lawrence*, Justices, both observed that the case cited arose on the statute 21 *Jac.* 1. c. 19. s. 11.] The plaintiff has lent himself to a fraud in order to cheat *Pyke's* creditors, by making them suppose that the goods belonged to *Pyke*, and he is now estopped from saying that they are not *Pyke's*.

*Best* and *Vaughan* Serjts. contra. Even supposing it were the general law, instead of a mere regulation of the magistrates, that the person licensed must live in the house, it does not follow that the consequence of the infraction of the law is the forfeiture of all the property which is put into the house, a consequence which would seriously affect many persons who put personal property of great value into hotels, in *London*, and elsewhere, in which they do not themselves live. The visible possession of goods is not sufficient to justify a caption: the sheriff takes them at his peril: if that were sufficient, the statute of 21 *Jac.* would have been unnecessary. It is, besides, a very different case, whether the former owner of goods, after selling them, even for a valuable consideration, still retains the possession, or whether an owner originally having, and still retaining the property of the goods, commits the custody of them to another: and from *Twyne's case*, 3 *Co.* 80. downwards it has never been held that the putting a man into possession of goods which were not originally

[ 259 ]

1810.

—  
 DAWSON  
 v.  
 WOOD  
 and Others.

originally his, makes them a fund for payment of his debts; and as for obtaining for him a false credit by the means of such possession, the name which stands upon the door of the house, which is not *Pyke*, but *Hindley*, could not mislead the defendants into this error; and even all the licences, except the beer licence, (which was obtained in *Pyke's* name only four days before the execution levied, and therefore could not be notorious,) are still granted in *Hindley's* name: any one of the tradesmen who serve the house, and who all give credit to the plaintiff not to *Pyke*, would, upon inquiry, have told the defendants that these were the goods, not of *Pyke*, but of the plaintiff, whose house only this must be laid to be, in an indictment in case of burglary. It was not the possession of the goods that induced the plaintiff in the execution to give credit to *Pyke*, for the debt subsisted three years before. It was never left to the jury whether this were any shift or contrivance to cause *Pyke* to be considered as the owner of these goods.

MANSFIELD, C. J. I thought at the trial that the conduct of the plaintiff had not left it in his power to say, as to the creditors of *Pyke*, that *Pyke* was not the real owner of these goods. It was nonsense to talk of the goods being lent, for the goods were to be consumed, not to be returned, therefore it was the same thing as the plaintiff's telling the world, or at least the magistrates, that *Pyke* was the person legally entitled. The plaintiff is the actual procurer of this licence, and furnishes money for it, and it seemed to me to stop the plaintiff's mouth, and to put it out of his power to say these were not *Pyke's* goods. I find my learned brothers are of a different opinion. I defer to their authority, but cannot say I think otherwise.

[ 260 ]

HEATH, J. I cannot agree with my Lord, it is not sufficient that *Pyke* is the ostensible owner of the goods, if so, there would have been no need of the stat. 21 Jac. 1., and so to hold, would be extending that statute to all other cases as well as bankruptcy. The case of *Cadogan v. Kennet, Cowp. 434.*, and the other cases in the King's Bench, are very distinguishable from this.

LAWRENCE, J. In the case of *Haselinton v. Gill, 3 T. R. 620.*, where cows were bought and settled on the wife, it was held that they were not liable to an execution for the husband's debts. If there is any thing in this case, it would be the argument that the possession of the goods gives *Pyke* a false credit; but the same argument would hold wherever goods have been lent; and it has never yet been held, (unless where, as in

*Twynes's*

*Twynes's* case, the original owner has sold goods and retained the possession, and except in cases of bankruptcy, on the statute of 21 Jac. 1.,) that a person may not give the possession of his goods to another. It would be of very great importance, for many trades are carried on by ostensible persons, where others are behind, who do not appear; and it has never yet been held, except in cases of bankruptcy, that they are liable for the debts of their servants.

CHAMBRE, J. I am of the same opinion. The statute of 21 Jac. 1. would never have been made, if the law had been so. I am of opinion with my two Brothers who spoke last, and it would be extending the provisions of that statute much farther than has been hitherto done, to apply it to this case.

Rule absolute for entering a verdict for the plaintiff, for 66*l.* 18*s.*

1810.  
—  
DAWSON  
v.  
WOOD  
and Others.

---

OULDS and Others v. SANSOM.



[ 261 ]

Nov. 22.

**T**HIS was a writ of right. The demandants, three coheirresses, *femes covert*, suing without their husbands, by their attorney, demanded certain premises in *Leighton, Essex*. They counted upon the seisin of *Mary Lewis*, and averred that upon her death, for that she died without issue of her body, the right descended to *John Spriggs*, father of the demandants, who was cousin and heir of the said *Mary*, and further derived title to themselves from him. The tenant demurred specially, for that it was not expressly and positively averred and shewn how *John Spriggs* was cousin and heir of *Mary Lewis*, but only argumentatively, whereas the cousinage of the said *John* to the said *Mary*, ought to have been directly and expressly shewn by the count.

*Feme covert*  
cannot make  
an attorney.

*Best*, Serjt. in support of the demurrer, took a preliminary objection, that *femes covert* could not make an attorney.

*Shepherd*, Serjt. admitted he could not answer this objection.

LAWRENCE, J. It is matter in abatement of the writ. The judgment must be *quod breve cassetur*.

Judgment for the tenant.  
Mayor



1810.

Nov. 23.

## Mayor of DONCASTER v. DAY.

What a dead witness has sworn on a former trial between the same parties, is evidence in the cause, and may either be read from the Judge's notes, or proved upon oath by the notes or recollection of any person who heard it.

THIS was an action of trespass, brought by the mayor and corporation of *Doncaster*, to try whether the public had a right to pass with goods from ships lying in the river, over a bank at a place called *Docking-Hill*, which the plaintiffs claimed to be their soil and freehold, in order to cart the goods upon a highway lying beyond the bank, and parallel to the river: the same plaintiffs had commenced other actions for the like cause, against other defendants. They had proceeded to trial in this cause; and the verdict being adverse to the corporation, and repugnant to the weight of evidence, upon an application for a new trial, the Court had directed, that this cause should abide the event of the verdict in another of the causes, which was in progress for trial.

*Clayton*, Serjt. on this day prayed on behalf of the plaintiffs, that if any of the witnesses, many of whom were very aged, should die or become unable to attend in the mean time, their evidences given upon the former occasion might be read at the next trial.

MANSFIELD, C. J. You do not want a rule of court for that purpose: what a witness, since dead, has sworn upon a trial between the same parties, may, without any order of the Court, be given in evidence, either from the Judge's notes, or from notes that have been taken by any other person, who will swear to their accuracy; or the former evidence may be proved by any person who will swear from his memory to its having been given.

HEATH, J. concurred in refusing the application.

[ 263 ]

Nov. 24.

## VENN v. WARNER.

If bail by mistake misname in the recognizance the plaintiff to whom they mean to be bound, the Court will not rectify the recognizance and

proceedings in an action thereon after issue joined on *nul tiel record*.  
 IN the commencement of this action the plaintiff was called by his true name of *Daniel Nicholas Venn*, but the defendants, both in giving bail to the sheriff, and in putting in bail above, called the plaintiff *Christian Nicholas Venn*, which name was found in the bail recognizance; the plaintiff having sued in that name in an action against the bail, they pleaded *nul tiel record*.

The

The mistake being discovered, *Clayton*, Serjt. had obtained a rule *nisi* for amending the recognizance, and the subsequent proceedings, by substituting the name of *Daniel* for *Christian*.

1810.

VENN

v.

WARNER.

*Lens*, Serjt. shewed cause, upon an affidavit, which repelled the charge made by the plaintiff, that the bail had designedly made the misnomer with a view of eluding the responsibility.

*Clayton*, contra. If no fraud was practised, the bail intended to be bail in this cause; and then it is only a clerical mistake, which the Court will rectify. There is no dispute about the identity of the parties meant, nor any action pending in the Court at the suit of any person named *Christian Nicholas Venn*, and the mistake, if any, originated with the defendant, but if it were a trick of the defendant, then the reason is the stronger that he ought not to be permitted to profit by it.

LAWRENCE, J. It amounts to this: the bail say they acknowledge themselves to be indebted to *Christian*, not to *Daniel*; these are therefore not bail in this cause: the defendants have never recognized in this action.

The Court discharged the rule, and upon the issue of *nul tiel record*, gave judgment for the defendants.

[ 264 ]

## HARRIS v. PACKWOOD and Another.

Nov. 24.

THIS was an action brought against the defendants, who were common carriers, to recover the value of forty-six pounds of silk, delivered to them in *London*, to be carried from thence by their waggon to *Coventry*, and never received there by the consignees. Upon the trial at Guildhall, at the sittings after the last *Trinity* term, before *Lawrence*, J., it was proved that the goods were delivered and booked at the warehouse in *London*, from whence the waggon set out, and that they were seen safe at *Market-Street*, in the road to *Coventry*, but that they never arrived at *Coventry*. That their value was 126*l.*; that the

If a carrier gives notice that he will not be accountable for goods above the value of 20*l.* unless entered and insurance paid, over and above the price charged for carriage, according to their value, a person who enters silk exceeding the value of 20*l.*,

and does not pay the insurance, cannot recover any part of the value of the goods, if lost.

Although the price he agrees to pay for the carriage of the silk, is, on account of its superior value, higher than the ordinary price charged for the carriage even of bulky articles.

And although the carrier does not prove that the loss happened by any of those accidents against which the law makes him an insurer.

The carrier is not bound to prove that he used reasonable care.

Semb. A carrier is entitled to make a higher charge for the superior risk attending the carriage of valuable goods, but the charge must be reasonable.

waggon

1810.  
 ———  
 HARRIS  
 v.  
 PACKWOOD  
 and Another.

[ 265 ]

waggon by which they were carried, formerly was built with bows, and when the bows were closed, it was very difficult to take a large parcel out of the loaded waggon, but that for some time past these bows had been taken off and discontinued, in order to make it more easy to load the waggon, and to enable it to receive a larger load, but that this alteration rendered it an easier matter to take out a parcel. The waggon had also formerly been guarded, but there had been no guard to attend it for the last two years. The waggon usually arrived at *Tow-ccster* at two o'clock in the morning, and remained there until twelve at noon, in a yard, under the wall. It was the waggoner's practice on his arrival there, to call up the innkeeper, and to go to bed himself. The defendant relied upon his having published an advertisement in *November 1806*, which he had sent round to all the silk-traders who then used his waggon, and, amongst others, to the plaintiff, announcing that he would not be accountable for any package whatsoever above the value of 20*l.*, unless entered, and an insurance paid, over and above the price charged for carriage, according to their value, and that no such insurance had been paid in this case; the plaintiff answered this by proving a former advertisement circulated by the defendant, containing special terms for the carriage of silk, *viz.* 9*s.* 4*d.* *per cwt.*, while for ordinary bulky articles he charged 6*s.* only, and he contended that the higher price of 9*s.* 4*d.* *per cwt.*, included the premium of insurance. It was admitted, that if the goods had been delivered, the plaintiff would have paid for them at the rate of 9*s.* 4*d.* *per cwt.* Some other persons paid a halfpenny *per lb.* of silk, besides the price of carriage, for insurance.

*Shepherd*, Serjt. for the defendant, contended that the claim for insurance meant the same thing, as if the defendants had said, if goods are of a certain value, we must receive a halfpenny more in every pound of their value for carrying them; and as the plaintiff had not engaged to pay that, he could not make the defendant in any wise responsible for the loss.

LAWRENCE, J. thought, that as a specific sum was paid for the carriage, and something was to be paid over and above the carriage for insurance, the word insurance must be applied to those risks against which a carrier is bound by law to insure, *quid* insurer, as fire, robbers, armed force and the like, and that the sum required for insurance must be received as the price of guarding against those accidents; but that without the payment  
 of

of any such insurance, he was still bound to guard against loss by exposure, carelessness, driving into a river, or the like; otherwise a carrier might receive the price of carrying the goods, and nevertheless be as careless as he pleased: in this case it did not appear that the parcel was not lost through mere negligence: there was good reason why a carrier should be made acquainted with the value of the goods committed to him, that he might take the greater precaution against fire, or take greater force to resist felons; but here the defendant was satisfied with the price of the carriage, and undertook to carry for that price, but claimed something further for insurance: what does that mean? surely not for an insurance against his own default of duty! It was incumbent therefore on the defendant to shew that he took reasonable care of them, not on the plaintiff to prove a negative, and that the defendant took no care of them. The jury, under his direction, found a verdict for the plaintiff, for 126*l.* damages, with liberty reserved to the defendants to move for a new trial or nonsuit as they might be advised.

*Shepherd*, Serjt. having accordingly in the present term obtained a rule *nisi* to enter a nonsuit,

*Best* and *Vaughan*, Serjts. on this day shewed cause; when *Lawrence*, J., upon reporting the evidence, said, that at the time of the trial he had not read the case of *Nicholson v. Willan*, 5 *East*, 507. In that case there was no distinction in the advertisement between the price of carriage, and the price of insurance, but the distinction was taken in argument, and relied on; the Court, however, held the defendant not liable. *Best* contended that this difference in the two advertisements materially distinguished the present case from that of *Nicholson v. Willan*; here the contract is, that a certain price shall be paid for carriage, and an insurance over and above that: therefore, inasmuch as the contract is to be taken most strongly against the party who words it, the price of carriage is the compensation for the labour and diligence to be bestowed, and the price of insurance is the price for covering those risks which are purely accidental. [*Lawrence*, J. In *Nicholson v. Willan* it was very doubtful whether the goods had gone by any carriage.] By the statutes 3 & 4 *W. & M. c.* 12., and 21 *G. 2. c.* 28., the price of carriage is to be fixed by the magistrates at their quarter-sessions, and the latter statute inflicts a penalty of 5*l.* upon carriers who bring goods to *London*, for taking a higher price than is allowed by the sessions of the county from which they set out;

1810.

HARRIS  
v.  
PACKWOOD  
and Another.

[ 267 ]

1810.  
 HARRIS  
 v.  
 PACKWOOD  
 and Another.

[ 268 ]

and this statute is not, as it has been supposed, repealed by any subsequent act; but if these statutes be now in force, it is impossible that a carrier can refuse to carry goods for the price which the sessions fix. [*Heath, J.* It does not appear that any order of sessions has been made in the present case.] The case of *Oppenheim v. Russell*, 3 Bos. & Pull. 42., contradicts the position, that though a carrier cannot get rid of his whole responsibility, he may vary it in any shape that he pleases. All four of the Judges there held, that a carrier could not create a lien upon the goods delivered to him for his general balance, because he was bound by the law of the country to receive and carry goods for a reasonable reward. [*Lawrence, J.* That was a lien as against the owner of the goods to whom they were consigned: the Court did not say that the carrier could not have a general lien against the party sending the goods, if he were also the owner.] But as the law binds the carrier equally to insure, as to carry, if he cannot prescribe the terms on which he will carry, so neither can he prescribe the terms on which he will insure: or, if he may, yet it is not competent to him to require payment for an insurance against his own negligence, by which, so far as appeared, this loss was occasioned. Nay more, it was the effect of his own capidity, for the waggon formerly was advertised as going with a light and a guard, and inasmuch as the defendant had never publicly countermanded that advertisement, the plaintiff had a right to suppose that it was still lighted and guarded: he was also bound to have a waggon secure from theft, to which he has rendered it more liable by taking off the bows; yet, without giving any notice of the alteration, he continued to receive the same rate of carriage as he did when the bows were there and the waggon guarded, which is a gross fraud. The non-payment of the price of insurance cannot exonerate the carrier from the duty of ordinary diligence and care; if he wishes to avail himself of his renunciation of the character of insurer, he must shew that the loss happened by an insurable accident, and not by that degree of negligence, against which every man who undertakes to do any thing for hire, is bound to guard. The case of *Tiley v. Morrice*, Carth. 485., and all the old cases, are cases where a deceit is put upon the carrier as to the value of the goods, and he is relieved against it. *Lanc v. Cotton*, Salk. 18. Lord Holt, C. J. says "it is a hard thing to charge a carrier; but if he should not be charged, he might keep a correspondence with thieves, and cheat the owner of his goods, and

and he should never be able to prove it." This is not only sound law, but excellent sense, as well as great authority. *Lyon v. Mells*, 5 East, 430. The carrier had given notice "that he would not be liable for any damage which should happen to a cargo, unless it were occasioned by the want of ordinary care in the master or crew of the vessel, and in such case, he would pay 10*l. per cent.* upon the loss, provided it did not exceed the value of the vessel and freight: and that persons desirous of having their goods carried free of any risk, might have the same so carried by entering into an agreement for the payment of extra freight, proportionable to the accepted responsibility." Yet, where a loss happened by the vessel not being seaworthy, the owner was very properly held liable to the whole extent of the loss, though it was not one of the events in which he consented to be in any case nor to any amount liable. *Ellis v. Turner*, 8 Term Rep. 532. The defendant endeavoured to avail himself of a similar notice, but the master of the vessel having carried the goods beyond the place where they were to be delivered, and at which she touched and delivered a part, and the ship being lost on the ulterior voyage, it was held that the owner was liable beyond the 10*l. per cent.* for the full amount of the loss. It would be carrying the matter much further than the cases have hitherto gone, to say that because a person does not insure, therefore he shall have no remedy for a loss which is not occasioned by insurable perils. The contract in this case is not very explicit, but it is to be expounded with at least as much liberality towards the public as towards the carrier. If then it had been expressly worded that the defendant would not be liable for any loss incurred by the negligence of himself or his servants, unless an insurance over and above the charge for carriage were paid, would not the Court reject those words, and say that he should not require a premium for insurance against losses which might happen for the want of that care which is paid for in the price of carriage?

*Shepherd*, contrâ. The cases of *Lyon v. Mells*, and *Ellis v. Turner* are not applicable; the first was decided on the ground of gross negligence in the carrier, who had accepted the goods to carry, not upon the ground that he might not limit his responsibility. In the second case the goods were not lost in the course of the carriage which the defendant had undertaken, but he had gone beyond the point where they were to be delivered. If the law, that carriers may limit their responsibility, be wrong,

1810.

HARRIS  
v.  
PACKWOOD  
and Another.

[ 269 ]

[ 270 ]

1810.  
 ———  
 HARRIS  
 v.  
 PACKWOOD  
 and Another.

the legislature alone can alter it; but it probably is the wisest policy to leave things to find their own level; if the law fixed the same price for goods of the highest, as of the least value, no one would be a carrier. To shew that the law had long been so established, he cited *Kenrick v. Eggleston*, *Alcym*, 98. *Tiley v. Morrice*. *Gibbon v. Paynton*, 4 Burr. 2298. *Clay v. Willan*, 1 H. Bl. 298. *Izet v. Mountain*, 4 East, 371. A warehouse-keeper may be answerable for a loss by fire, if the loss happens by his especial gross negligence: but in general, a warehouse-man is not answerable for that species of loss. So, a carrier, like any other person, may be liable for gross negligence, but if he makes an especial acceptance of the goods, he is not liable unless the plaintiff shews that he is guilty of this gross negligence. It would be impossible for the defendant ever to prove the negative, that he was not guilty of gross negligence. *Rothwell v. Davis*, B. R. sittings after the last Easter term before Bayley, J., the carrier gave notice that he would not be answerable "unless the goods were entered, and properly paid for." Nothing was paid but the booking, and it was held that the plaintiff could not recover. So, in this case, the carrier requires the goods to be "entered according to their value," which is not done; so that even if all that relates to the insurance be laid out of the question, still the plaintiff cannot recover. [Lawrence, J. No, the words are, "will not be answerable unless entered," he does not say "entered according to the value," but that the insurance shall be according to the value.] *Clay v. Willan* is in point, where the words were that he would not be answerable for goods above five pounds value, unless entered as such, and a penny insurance paid for each pound value. If the carrier were to say he would not be accountable for any of his acts commissive or omissive, although they amount to gross negligence, that would be an exception of the very thing, and the Court would not permit such a contract; but that is not this case.

[ 271 ]

MANSFIELD, C. J. These cases, so decided, seem to have decided the present. However we may wish the law to be, we cannot make it different than as we find it. In looking into the books, we find the special acceptance much older than I had supposed it to be. And it leads to great frauds, for on account of the number of persons always attending about these open waggon yards and offices, every person standing around is apprized that this or that parcel contains watches or jewels to

the amount of many hundred pounds; this is a great inconvenience, but however inconvenient it is, it seems that from the days of *Aleyn* down to this hour, the cases have again and again decided that the liability of a carrier may be so restrained; then the question is, whether this loss is within the contract that has been made, and it seems, according to one or two of the cases, that it is not; for the losses have been of a very suspicious nature; in one case, the parcel seems to have been lost, before it left the yard; but however, as there was no proof here of express negligence, it seems that there must be a rule absolute for a nonsuit. It would, however, be useless to pass any such statutes to limit the price of carriage, if a carrier be at liberty to charge what he pleases: the price must be reasonable.

HEATH, J. was of the same opinion. In some waggons there are particular safe places in the very center, to deposit jewels and articles of superior value, when they are known to be such.

LAWRENCE, J. I was not aware of the cases which have been made use of, for the word "insurance." It is a very foolish word, and if the defendants had said, we will not in any case be liable for the goods, unless a certain sum is paid, according to the value, it would have been clear and intelligible; and there is nothing unreasonable in a carrier requiring a greater sum, when he carries goods of greater value, for he is to be paid not only for his labour in carrying, but for the risk which he runs, which is greater in proportion to the value of the goods. I would not, however, have it understood that carriers are at liberty by law to charge whatever they please: a carrier is liable by law to carry every thing which is brought to him, for a reasonable sum to be paid for the same carriage; and not to extort what he will.

CHAMBRE, J. I am of the same opinion. The defendants say they will not be insurers, we will not enter into that situation at all, unless we are paid according to the value. Therefore there must be a nonsuit.

Rule absolute.

1810.

HARRIS

PACKWOOD  
and Another.

[ 272 ]



1810.

Nov. 26.

After a defendant has undertaken to accept short notice of trial, he cannot compel a plaintiff, resident abroad,

[ 273 ]  
to give security for costs.

## MULLER v. GERNON.

*FRERE*, Serjt. had on a former day in this term obtained a rule *nisi* that the plaintiff, who was a foreigner, and the captain and owner of a ship trading from this country to the *Baltic*, and back, should give security for the costs of the action.

*Best*, Serjt. now shewed cause upon two grounds. First, on an affidavit that the plaintiff had frequently traded hither, and that it was believed he would return, and that according to the case of *Nelson v. Ogle*, *Ante*, 2. 253. the Court will not compel a foreign mariner trading to this country, to give security for costs; secondly, that the plaintiff, having commenced this action for 613*l.* freight due to him, sailed with his vessel in *September* last, after which time, the defendant, on the 13th of *November*, obtained a Judge's order for time to plead, on the usual terms of pleading issuably, and taking short notice of trial: he had since pleaded, and the plaintiff had now actually given notice of trial, after all was too late to ask for security for costs.

*Peckwell*, Serjt. (for whom *Frere* had obtained the rule,) endeavoured to support it, on the ground that when the plaintiff commenced the action, he was in this country, and the defendant was therefore not then entitled to ask for security for costs, and that as the plaintiff was owner of a vessel in which he had sailed, there was not the same probability of his return as in the case of foreign mariners serving in the ships of *British* owners, which were domiciled here; and that this motion was made before plea pleaded.

MANSFIELD, C. J. In 2 *H. Bl.* 593. *Michel v. Pareski*, this Court decided, that after the defendant had undertaken to accept short notice of trial, they would not compel a foreigner resident abroad to give security for costs. This defendant has so undertaken, consequently,

The rule must be discharged (a).

(a) *STEEL v. LACY* (1).

[ 274 ] *Marshall*, Serjt., a few terms since, moved to make a rule absolute to stay proceedings until security should be given for costs, the plaintiff being an *American*, resident in *Philadelphia*.

*Shepherd*, Serjt. shewed for cause, that notice of trial was given for the sittings after *Easter* term.

*The Court* said the defendant came too late, and

Discharged the Rule.

(1) *Ex relatione Mri. Holmes.*

HILL

1810.

## HILL v. PERROTT.

Nov. 9.

**B**EST, Serjt. moved to set aside the verdict which had been found in this cause for the plaintiff, at the sittings after the last *Trinity* term before *Mansfield*, C. J. in *London*, and to enter a nonsuit. The action was for goods sold: there were special counts upon a contract of the defendant to pay for goods to be delivered at his request to *Jean Meers Dacosta*; but the evidence being of a contract to pay for goods to be delivered to *Isaac Mendez Dacosta*, those counts failed the plaintiff. The evidence was, that goods to a considerable amount were looked out to be delivered to *Dacosta*, for which the defendant undertook to accept a bill at six months, to be indorsed by *Dacosta*. The goods were delivered to *Dacosta*, and afterwards were found in the defendant's possession: the whole was a swindling transaction, in which *Dacosta* was a mere instrument. *Dacosta* was insolvent, and the defendant having become a guarantee for him, assisted him to buy these goods, which were, the moment after, made over to himself for his own indemnity. The only count that would serve the plaintiff, was *indebitatus assumpsit* for goods sold, upon which he obtained a verdict.

*Indebitatus assumpsit* lies for goods, which the defendant had by fraud procured the plaintiff to sell to an insolvent, and which the defendant had gotten into his own possession; for he could not set up the sale, because his own fraud had procured it, and the mere possession, unaccounted for, raise an *assumpsit* to pay.

*Best*, Serjt. on this day moved to set aside the verdict and enter a nonsuit. Whatever difficulty he might have in defending his client at another bar, there was no contract of sale, he said, between him and the plaintiff.

[ 275 ]

The Court held, that the law would imply a contract to pay for the goods, from the circumstance of their having been the plaintiff's property, and having come to the defendant's possession, if unaccounted for; and he could not be permitted to account for the possession by setting up the sale to *Dacosta*, which he had himself procured by the most nefarious fraud, because no man must take advantage of his own fraud; therefore *indebitatus assumpsit* lay for the goods, and the verdict could be supported, and they

Refused the Rule.

DONVILLE,

1810.

Nov. 22.

DOMVILLE, Demandant; KINDERLEY, Tenant; COLLIER, Vouchee.

If a warrant of attorney for suffering a recovery be acknowledged in a part of the *East Indies*, far distant from the residence of

[ 276 ]

any notary public or *British* magistrate, an affidavit of the acknowledgment, made before a *British* consul or agent there, will suffice.

**LENS**, Serjt. moved that a recovery might pass, although the acknowledgement of the warrant of attorney, which was taken in the *East Indies*, was not taken before a notary public. He moved this upon an affidavit, that the necessary deeds and a writ of *dedimus potestatem*, directed to certain officers in the same regiment in which the vouchee served, were sent out to *Calcutta*, but that at the time of their reaching the vouchee, he was stationed at *Lucknow*, in the dominions of the Nabob of *Oude*, where he executed the deeds, and acknowledged the warrant of attorney, and an affidavit of the acknowledgment was made by *Paris Bradshaw*, Esquire, one of the commissioners, before *J. Baillie*, Esquire, the *British* consul or agent of the *East India Company*, resident at the Court of *Lucknow*, who was neither a notary public, nor a magistrate; the affidavit was not sworn before a public notary; and the vouchee stated, in a letter sent back to *England* with the deeds, that there was no notary public within eight hundred miles of the place. Upon inquiry at the *India House*, the truth of this statement was confirmed by the Company's secretary and chairman.

The Court directed that the recovery should pass, upon first obtaining an affidavit from the secretary or chairman of the *East India Company*, that there was neither any magistrate appointed by the Company, nor public notary resident at *Lucknow*, and provided that it should be made to appear that the acknowledgment of the warrant of attorney was taken before two commissioners, which was not distinctly stated upon the present affidavit.

[ 277 ]

Nov. 26.

AUBERT v. WALSH.

Money deposited upon an illegal wager, laid on a future event, may be recovered back again before the period of time has elapsed, on the expiration of which the decision of the wager depends.

**THIS** was an action for money had and received, brought to recover back the premiums which the plaintiff had paid to the defendant upon an instrument or policy, dated the 15th day of *September* 1808, by which, in consideration of forty guineas for 100*l.*, and according to that rate for every greater or less sum received of *B. Aubert*, jun., the defendant promised to pay the plaintiff the sum of money which he had thereunto subscribed, without any abatement whatever, in case a cessation of hostilities between

between *Great Britain* and *France* did not take place, followed up by a peace previous to the re-commencement of hostilities, or preliminaries of peace were not signed, on or before the 1st day of *July* 1810. This was subscribed, one thousand pounds, *B. Walsh*: premium received, 15th *September* 1808. The defendant accompanied the general issue with a notice of set-off. Upon the trial of this cause at Guildhall, at the sittings after *Easter* term 1810, before *Mansfield*, C. J., it appeared that the defendant had received the premium, and signed the policy, that on the 31st of *October* 1808, a commission of bankruptcy is-ued against the defendant, under which he was duly found and declared a bankrupt, that soon afterwards, and before the 1st day of *July* 1810, the several other persons who had paid premiums upon similar policies, claimed to prove before the commissioners, the amount of the premiums paid, as a debt due from the bankrupt's estate; but that the commissioners refused to permit the proofs. Upon which the plaintiff thought it useless to prefer his claim, and no direct demand was made for the re-payment of the premiums before this action, the declaration in which was entitled of *Easter* term 1810. The defendant contended that the plaintiff could not succeed, because if the wager were illegal, the parties were *in pari delicto*, and the law would not interfere to help either. For the plaintiff it was answered, that it was competent for him at any time before the event was decided on which the wager was to depend, to abandon the contract, as had here been done, and in that case, to recover back the premium paid: *Mansfield*, C. J. reserved the point, subject to which the jury found a verdict for the plaintiff.

*Best*, Serjt., in this term, had obtained a rule *nisi* for setting aside the verdict, and entering a nonsuit.

*Shepherd* and *Marshall*, Serjts. on a subsequent day shewed cause. Although this contract is not drawn up in the regular form of a policy, it is a contract of wager on a subject on which it was not legal to lay a wager, being prohibited by the statute 14 *Geo. 3. c. 48. s. 1.* in which the words, "or any other event whatsoever," go far beyond mere life policies, as was held in the case of *Roebuck v. Hamerton*, *Cowp.* 737. upon a wager on the sex of the *Chevalier D'Eon*. And the sum paid having been demanded back before the time had elapsed which was to determine the policy, the plaintiff may recover it. All the cases decide that it may be recovered before the risk has been run, and

1810.

AUBERT  
v.  
WALSH.

[ 278 ]

1810.

AUBERT  
v.  
WALSH.

[ 279 ]

and some even go so far as to say that it may be recovered after the event has been decided; though the greater number hold, that after the risk has been run, the premium cannot be recovered back. Such are *Lowry v. Bourdieu*, 2 Doug. 470., where *Buller, J.* says, "there is a sound distinction between contracts executed and executory, and if an action is brought with a view to rescind a contract, you must do it while the contract continues executory, and then it can only be done on the terms of restoring the other party to his original situation." *Willes, J.* there thought the plaintiff entitled to recover back the premium, although the event had happened. [*Mansfield, C. J.* No loss had happened in that case.] The party had waited to see whether a loss would happen or not, before he rescinded the contract, which was the reason of the judgment. *Andree v. Fletcher*, 2 T. R. 181. 3 T. R. 266. It was held that the premium paid for a re-assurance could not, after the capture had happened, be recovered back. *Vandyck v. Hewit*, 1 East 96. The premium paid upon a policy designed to cover a trading with an enemy's country, cannot be recovered back. *Howson v. Hancock*, 8 Term Rep. 575. Where money, deposited with a stakeholder upon an illegal bet, had been paid over by the stakeholder to the winner with the consent of the loser, and the loser brought an action to recover it back, the Court held that *potior est conditio possidentis*. But in the case of *Cotton v. Thurland*, 5 T. R. 405., it was held, that although the risk was determined, yet money deposited on a bet, and still remaining in the hands of the stakeholder, might be recovered back from him by the loser. *Lacausade v. White*, 7 T. R. 535. The defendant received 100*l.* to pay 300*l.* if articles of peace were not settled between *England* and *France* before the 11th of *September* 1797. The plaintiff after that day sued on this agreement for the 300*l.*, which it was held he could not recover, because the wager was illegal; but it was held that he might recover back his premium, the Court saying, that it was more consonant to the principles of sound policy and justice, that wherever money has been paid upon an illegal consideration, it may be recovered back again by the party who has thus improperly paid it, than, by denying the remedy, to give effect to the illegal contract. [*Chambre, J.* That doctrine has been several times adopted in favour of oppressed persons, but that is the distinction.] *Tappenden v. Randall*, 2 Bos. & Pull. 467. A bankrupt had paid two hundred guineas to the defendant to

[ 280 ]

receive an hundred annually until the amount of the hop duties should reach 100,000*l.*, and it was held that his assignees might recover back the premium paid, although the wager was illegal; and *Heath, J.* there adopted as sound the distinction taken by *Buller, J.* between contracts executory and executed, if taken with those modifications which he necessarily would have applied to it. Where nothing occurred of a nature too grossly immoral for the Court to enter into any discussion of it, he thought there ought to be a *locus pœnitentiæ*: and that a party should not be compelled against his will to adhere to the contract. In the present case it is unnecessary to consider how the rights of the parties would have stood if the 1st of *July* had arrived before the plaintiff had rescinded the contract, nor whether in that event the doctrine of *Lacaussade v. White*, or that of *Lowry v. Bourdieu* should have prevailed: suffice it to say, that the result of all the decisions is, that where a party has paid money upon a wager or policy that cannot be sustained by law, there he may rescind that contract before the event has happened on which the decision of the wager depends, and no case contradicts this position. There is no *par delictum* in this case, for there is no moral turpitude in the contract, a distinction that has been often established.

*Lens and Best, Serjts. contra.* In *Lowry v. Bourdieu* only *Buller, J.*, of all the Court, takes the distinction between contracts executory and executed, and he does not mainly rely on it, but only adds it to his other reasons. The distinction however is fallacious as applied in the present case, for if a contract be illegal, it is void; it is then no contract; it cannot be said to be either executed or executory. The distinction is solid as applied to legal contracts, but here it makes no difference in substance or in law at what time the plaintiff brings his action: it is not in his option to keep alive or to rescind a contract, where the law declares that no contract subsists. [*Mansfield, C. J.* In *Tappenden v. Randall*, the Court considered the distinction between contracts executed and executory as established; the Judges all make that distinction; it is not called in aid, it is the ground of their judgment; although Lord *Alvanley, C. J.* distinguished also between contracts immoral and merely illegal.] That last distinction may also well be questioned as applicable to that case; for no contract is innocent, which is productive of inconvenience to the state: but the ground of that case was, that up to the time of bringing the action, no disclosure had been

1810.

AUBERT  
v.  
WALSH.

[ 281 ]

1810.

AUBERT  
v.  
WALSH.

been made of the amount of the hop duties, and that the disclosure only was inconvenient and therefore illegal; but in the case of *Forster v. Thackeray*, B. R. Trin. 21 G. 3., afterwards in the Exchequer, 1 T. R. 57. n. (the first case that was determined on wagers on the continuance of peace or war,) the Court determined, that from the nature of the subject the thing was illegal. [Heath, J. It certainly was an ingredient in that judgment, that such contracts influence men's minds in a manner that may be prejudicial to the interests of the country, and therefore are void at common law.] The plaintiff may elect, indeed, whether he will await the event, to see if the other party will voluntarily pay him, but that is not a legal consideration. The plaintiff's only motive for repentance in this case, was not the illegality of the contract, but the bankruptcy of the paymaster, whose assignees could not employ his effects in paying illegal wagers. The parties meant to contract on honour; the plaintiff therefore still has all the security he ever contemplated, the honour of the bankrupt, and to that he must still look for the completion of his contract. If he has judged unwisely, he must abide by his choice. The action of *Lacause v. White* was brought, not to rescind, but to enforce the wager; and it seems to have been Lord Kenyon's own suggestion that the plaintiff should recover back the hundred pounds premium as money had and received. That case certainly has not been acted on since; and in *Vandysk v. Hewit, Le Blanc, J.* justly observes that the ground of that determination had been since very much canvassed, in the case of *Howson v. Hancock*. The law must be a rule to every man; and though it has been held for the protection of the weak, that even where there is *par delictum*, the best policy is not to allow the strong to retain the money they have gotten, yet here the parties meet on equal terms, and meant to proceed without any reference to the law at all. What necessity is there that the law should raise an *assumpsit* to pay back to you the money which you voluntarily and with your eyes open have parted with? The circumstance of money having been paid over to a winner, or still remaining in the hands of a stakeholder, makes no difference: for if the party is to be so far aided that he is to be put into the same condition as if he had not paid the money, it is upon the ground that the money has passed out of the plaintiff's pocket into the hands of one who has no legal right or conscientious demand to hold it. But the objection is, that where a transaction is illegal,

[ 282 ]

as this is, no party to it can come into a court of law and claim a benefit; now to receive back the money is a benefit. It is a proper punishment on the plaintiff if he has foolishly and improperly parted with his money, that he cannot again recover it.

*Cur. adv. vult.*

MANSFIELD, C. J. on this day delivered the opinion of the Court. This is an action on a wager brought to recover back the premiums paid, and it is resisted on the ground that it is an illegal wager, and that before the period at which the wager was to be determined, the plaintiff claimed the money which he had advanced to be repaid. There have been many cases cited, to prove that in the case of payment of money on illegal transactions, *potior est conditio possidentis*; but the distinction is taken here, that the demand of the money back, before the day, was a rescinding of the illegal contract. There is, however, some doubt on the soundness of that distinction, unless accompanied with some qualification, for it does not clearly appear what is the period before which the contract may be rescinded, because a man may wait till the event of the wager can be very clearly known and foreseen, and may he then rescind the contract, and save his money? However in *Lowry v. Bourdieu*, *Buller*, J. took the distinction between a case where the event had happened, and where a man had taken his chance of winning, and the case where he had not; and that distinction was expressly adopted by the Judges of this Court in *Randall v. Tappenden*, which was most clearly decided on that ground; and subject to the observation above made, I think there is good sense in that distinction; and why should not a man say, you and I have agreed so and so, but the agreement is good for nothing; I cannot bind you, and you cannot bind me, and therefore I desire, before the event happens, that you will pay me back my money; this is, in fact, a relieving against the effects which an illegal contract, persevered in, would produce. We therefore are of opinion that this distinction must be supported. But there is a very strange case in Mr. *Loff's* Reports, *Walker v. Chapman*; Lord Mansfield however there seems to have adopted the same doctrine; and it appears by his expressions as if the person came into Court, not to have the money back again after the event decided, but to rescind the illegal contract. I must take notice of one case, a very strong one, reported in 7 *T. R.*, *Lacaussade v. White*, where the Court said, it was more consonant to policy, that money paid on an illegal contract

1810.

AUBERT  
v.  
WALSH.

[ 283 ]

[ 284 ]



1810. contract might be recovered back, than that it should be retained. That was a strong case certainly in favour of the present defendant; but this doctrine is directly contrary to what Lord Kenyon, C. J. said afterwards in *Howson v. Hancock*, where he seems to have entirely forgotten *Lacaussade v. White*. Lord Kenyon there says, "there is no case to be found where, when money has been actually paid by one of two parties to the other upon an illegal contract, both being *participes criminis*, an action has been maintained to recover it back again." Now this is directly contrary to *Lacaussade v. White*; and he afterwards says, that *Howson v. Hancock* is very different from that case, which he says "was the case of a stake recovered from a stakeholder, before it had been paid over." But here he certainly mistook *Lacaussade v. White* entirely, for there is no stakeholder in the case, nor any thing like it: and in 1 East, 96., *Vandyck v. Hewit*, it was said by Lord Kenyon, that the rule had been settled in all times, that where both parties were *in pari delicto*, *potior est conditio possidentis*. I mention these cases to shew that the authority of *Lacaussade v. White* is very much shaken, and cannot be relied on, and that we do not decide on the authority of that case. But here the plaintiff, before the time of deciding the event, rescinds the contract, as he is at liberty to do.

Rule discharged.

[ 285 ]  
Nov. 26.

### STEEL v. LACY.

A neutral vessel is not seaworthy unless she is provided with documents to prove her neutrality.

Although the production of those documents would, if she had been captured by one particular belligerent, have rendered her liable to condemnation under an ordinance of that power.

If a neutral vessel be insured on a voyage on which it is notoriously necessary to carry simulated papers, in order to elude one of the belligerents, whether permission to carry them must be expressed in the policy? *quare*.

An American, bound from London to Riga, was taken by the Danes, and condemned for circumstantial reasons, and, amongst others, the want of a sea-passport and muster-rolls, she was provided with false clearances from Bergen, but they were not produced. Her sea-passport would have proved she had come from London, which, under the Berlin decree, would be a ground of condemnation by the French. Held that although it would subject her to this risk, she ought not to be without those documents which would prove her neutrality with respect to other belligerents.

and

and although they gave such evidence as they could, the case was not fully before the jury, and a verdict passed for the plaintiff, subject to a point reserved, whether the adjustment were conclusive against the defendant.

*Marshall*, Serjt. in *Easter* term 1810, obtained a rule *nisi* for a new trial upon two grounds: 1st, that the adjustment was a surprise on the defendant; 2dly, that the effect of it was repelled by evidence on the part of the defendant, shewing, by a *Danish* sentence of condemnation, that the ship, which had been represented to the underwriters to be *American*, was not furnished with all those documents which either by the law of nations or by treaty, she ought to possess. The nature of an adjustment, he argued, was well stated by Lord *Ellenborough*, C. J. in the cases of *Herbert v. Champion*, 1 *Campb. N. P. Cas.* 137., and *Shepherd v. Chewter*, *ibid.* 174., who says, it is a promise to pay, which is not binding, unless founded on the consideration of previous liability.

*MANSFIELD*, C. J. It is clear to me that there was a surprise. If the plaintiff means to rely upon an adjustment, he ought to give notice to the other party of his intention. As to the other point, it seems to be clear that an adjustment is not binding if it in any degree proceeds on mistake.

*LAWRENCE*, J. It is always competent to the defendant to shew that the adjustment ought not to bind him, although it is *prima facie* evidence of a case. There must be a new trial.

*Shepherd* and *Best*, Serjts. shewed cause against the rule.

Upon the second trial, at the sittings after *Trinity* term 1810, at *Guildhall*, before *Mansfield*, C. J., it appeared that the vessel insured had come from *New York* to *London* with a cargo of pitch, tar, and other naval stores; from hence she was chartered from *London* to *Riga*, and back, and sailed on the voyage under a *British* licence; while she was lying about two miles from the castle of *Elseneur*, she was boarded by a privateer, which carried her into a *Danish* port; she was libelled in the Prize Court of *Zealand* as prize, and condemned; the sentence of the Court was as follows: "In this present case against *George Thomas*, who, together with the ship *Pennsylvania*, whereof he was master, has been brought to this place on his voyage from *London*, it has been ascertained, that the ship *Pennsylvania* is not provided with any sea-passport, whereof Captain *Thomas* has alleged as the reason, that the passport granted him from his home station at *New York*, was styled for a fixed

1810.

STEEL

v.

LACY.

[ 286 ]

[ 287 ]

1810.

STEEL

v.

LACY.

a fixed voyage from *New York* to *Madeira*; in consequence whereof the *North American* consul at *London* had kept this passport, signifying, according to the nature of the passport, it was indifferent whether he had it or not: besides, he has exhibited in the court a certificate from the *North American* consul at *London*, purporting that, amongst several papers, he has deposited his sea-passport with the said consul. Now, as the reason alleged of the want of a passport is insignificant, because Captain *Thomas* ought not to have undertaken other or more voyages than such whereto he was authorized by his government, this want is also, (agreeably to the regulation for privateers, and the lawful adjudication of prizes of the 14th Sept. 1807, -8, -9, letter c.,) a reason of condemnation, and the court has no convenient reason at all to deviate from this severity respecting the circumstances of the case *in concreto*, being all against the captain. Thus, four men of his crew have unanimously declared, that two days previous to the seizure, in order to persuade them at *Elsineur* to assert that they came from *Bergen*, he had replied to their objections in this behalf, that he was provided with clearings from *Bergen*, and that he had a journal, conceived in such a manner as to make it appear that he came from *Bergen*: the remaining people of his crew, not confessing to have heard any such thing, had nevertheless not found it seasonable to deny, that at the time mentioned by the said four witnesses, he hath had several of the people collected (a) in their proof; and the captain, who denies to be or to have been provided with clearings from *Bergen*, &c. has, notwithstanding, confessed that he hath ordered the people to say that the ship came from *Bergen*. Likewise, it is ascertained, that when the captors came on board, he told them, that he came from *Bergen*, and that he did not change this declaration previous to his appearing in the court. A witness, yet of no unquestionable credibility, has constantly persevered in saying, that after the seizure, papers had been burnt on board; besides, considerable wants exist amongst Captain *Thomas's* papers; as, for instance, that his journal does not at all proceed from the time when he left ultimately his pretended home, but begins at a voyage from *Guadaloupe*; though he relates, that previous to that time he had sailed from *New York* to *Madeira*, and from thence to *Guadaloupe*, he is not pro-

[ 288 ]

(a) *Semb.* Some error of the translator.

vided

vided with any muster-roll; and the agreement in writing for the wages, made between the master and the crew at *London*, is not attested by the *North American* consul of the said place, whereby it might appear that at least it was with this officer's knowledge that he undertook this voyage; further there has been found amongst his papers, a letter, having all the characters of being fictitious, and fabricated for the purpose of making it probable that it is for account of the ship's pretended owner he is to sail for *Riga*, in order there to purchase a return cargo. We are of the opinion that the aforementioned partly decisive and partly suspicious *data*, are sufficient for to decide the fate of the ship *Pennsylvania*, and that it is needless to enumerate the several other suspicious circumstances which aggravate the same." Wherefore the sentence proceeded to condemn the vessel as prize. From this sentence the Captain appealed to the High Court of Admiralty at *Copenhagen*, which confirmed the decree in the following terms: "It is *in confesso* that the ship, pretended to be *North American* property, hath no sea-passport, in which respect Captain *Thomas* hath asserted that his passport was styled for a voyage from *New York* to *Madeira*; and that the *American* consul at *London* had retained the same, it being of no avail, as to the nature of the passport, whether the defendant had it or not: hence it follows, that even if Captain *Thomas* has been in possession of such a passport, he hath at least undertaken other voyages than those whereto he was authorized by his government, on which the passport so delivered could not protect him: this circumstance must, *in casu*, be so much the more binding against him, as the other circumstances of the cause are likewise against him. Out of his ship's crew, four men have witnessed that Captain *Thomas* had ordered them to say, that the ship came from *Bergen*: besides, he declared himself that he had papers along with him, purporting that he was cleared out from the said place. This circumstance is corroborated thereby, that Captain *Thomas* has confessed to have ordered them to say that he came from *Bergen*, which also he declared to the captors at their arrival at the ship, though he came from *England*: to this must be added, that the ship's journal or log-book is not commenced at her departure from *North America*, and that she has not been provided with any muster-roll, delivered or attested by an *American* officer, on account whereof and of the regulation for prizes, S. Q. A., the sentence of the Prize Court, as to the

1810.

---

 STEEL  
v.  
LACK.

[ 289 ]

1810.

STEEL  
v.  
LACY.

[ 290 ]

ship's condemnation, ought to be confirmed." The evidence of *Thomas* the master, who was gone out of this country, was read from the Judge's notes of what he had sworn on the former trial. He deposed that the ship was an *American*, that he had all regular documents on board, but that he believed they were all left in *Denmark*. That he had a sea-passport and a *British* licence, but that he produced neither to the Court at *Elsineur*: he did not produce the passport, because it would have shewn that he came from *New York* to *England* with naval stores. It was not usual for vessels to take a passport to go up the *Baltic*: he had told the masters of the privateers that he came from *Bergen*, but he did not produce clearances from *Bergen*: he had such on board. He had kept the charter-party and the sea-passport. The *American* consul, being examined, swore, that when the ship sailed from *England* he must have been satisfied the due papers were in his office. The first underwriter on the policy swore, that he did not know whether, at the time of the ship's sailing in *June* 1808 for *Riga*, it was necessary for a ship to have simulated papers, but that at present it was quite necessary: several brokers and other witnesses proved, that since the *Berlin* decree, the date of which was *November* 21, 1806, a ship could not safely proceed to the *Baltic* without simulated papers; that no policy would now be underwritten without liberty to carry simulated papers; that some underwriters had refused to subscribe policies, because the simulated papers were not well arranged; that no ship could sail to *Russia* without simulated papers, but that some policies on that voyage did, and others did not contain an expression of the liberty to use them. The defendant, as before, contended upon this evidence, that the ship was not properly documented as an *American*, and was therefore not seaworthy. Another ground of defence which he took, was, that she had carried simulated papers without permission. *Mansfield*, C. J. put a question to the jury, whether a ship could now sail to the *Baltic* without simulated papers, and they gave it as their opinion that, since the *Berlin* decree, she could not. The jury again found a verdict for the plaintiff.

*Marshall* in this term again moved to set aside the verdict and enter a nonsuit, upon both the abovementioned grounds of defence.

*Shepherd* and *Best*, Serjts. shewed cause. Every person who underwrites is bound to know the usage and course of the trade,  
and

and the mode of carrying it on, and if he \* insures the voyage, every thing which is necessary to the performance of the voyage is lawful under that insurance, without the permission being expressed. Thus, in the case of *Matthie v. Potts*, 1 *Park.* 6 *ed.* 29., the policy was on an adventure, contraband by the revenue laws of *Spain*, at and from *Nassau* to *Campeachy*, and at and from *Campeachy* to *Nassau*, and the risk to endure upon the goods until the same should be discharged and safely landed: the ship, being arrived in the bay of *Campeachy*, made signals for barks or launches from the shore, which came off, and the goods were put on board them, but before they were landed, they were taken by *guarda costas*; and it was contended that, as the policy did not expressly include the risk in craft and lighters, these goods were not within it; Lord *Alvanley* left it to the jury whether it were not notorious to the underwriters that this was the ordinary mode of conducting that trade; for that if it were, they must be understood to assent to it, and the jury found it was; and upon a rule *nisi* for a new trial, the verdict, which had passed for the plaintiff, was sustained upon this point, although it was lost upon the ground of a variance, because the loss was averred to be by hostile capture, whereas it was occasioned by a revenue cutter. [*Lawrence*, J. That policy was, until the goods were discharged and safely landed.] The duty of the master was discharged as soon as the goods were over the ship's side. [*Mansfield*, C. J. In the case of *Sparrow v. Carruthers*, 2 *Stra.* 126., it was held, that when the goods were delivered out of the ship on board the owner's own lighters, the risk ceased.] So here, as in *Matthie v. Potts*, they are to be considered as being virtually on board the ship, so long as they are in the course of being dealt with in the purchase and performance of the voyage. It is necessary to the performance of this voyage, that the vessel should have simulated papers: for if, being detained by a belligerent, the master produces simulated papers, he escapes; if he has them not, he is condemned. The acts of the usurper of *France* have made so complete a change in the circumstances of maritime commerce throughout *Europe*, that the mode of carrying on trade is entirely altered: that which was formerly the general rule is now become the exception, and that which was the exception is become the general rule; it is necessary to express the exception in a contract, it is not necessary to express the general rule. It was therefore unnecessary to express in the policy

1810.

---

 STAGL  
v.  
LACY.

[ \* 291 ]

[ 292 ]

1810.

STEEL  
v.  
LACY.

[ 293 ]

the permission to carry simulated papers, or to suppress the genuine papers. It is clear law that the assured need not disclose that to the underwriter, which is notoriously known to all men. It is notorious that a ship cannot go this voyage without simulated papers; it was in proof that underwriters would not insure without them. The defendants knew the voyage they were insuring; they knew that without these papers the vessel must have been condemned. They knew the vessel was an *American*, and that she had been at *London*, which alone would, under the *Berlin* decree, be a ground of condemnation. It is immaterial, therefore, whether they were informed that she came hither with a cargo of stores contraband of war. This Court decided in the case of *Toulmin v. Anderson*, ante, i. 227, that a master may take any thing on board which does not necessarily increase the risk, unless it be proved that the taking it on board does actually increase the risk. The taking these papers on board, (to sail without which would be absolute destruction,) certainly does not of necessity increase the risk, nor have the jury found that it did. Law is a relation to things, and as times and circumstances alter, the law must alter accordingly. Sir *W Scott* has declared that, under the present circumstances of *Europe*, if trade with the continent is to be carried on at all, it must be carried on by the aid of simulated papers. If a licence to carry them be not implied, the subscribing a policy is equivalent to an absolute contract to pay the assured the value of his goods upon their arrival in *France*, whither they will assuredly arrive, without the aid of these papers. If he be not at liberty to carry them, it would amount to the same thing as if the vessel were warranted free from capture by an enemy. Not only therefore is this licence implied, but it becomes an imperious duty on the assured to provide such papers: without them the ship is not seaworthy, and the assured would be guilty of a fraud if he were to omit them.

Secondly, as to the absence of genuine documents. If the vessel be at liberty to carry simulated papers, it necessarily follows that the master is at liberty to secrete all such genuine documents, as, being contradictory to the simulated papers, would, if produced, evince the deception, and render his condemnation certain. It would also have appeared by the real papers, that this neutral vessel had been to *London* with a cargo of naval stores, contraband of war, which would have ensured her condemnation. Besides, it does not appear clearly by the sentence, that

that the Court relied on the absence of the genuine papers. The sentence speaks of "partly decisive and partly suspicious data," without distinguishing the one from the other. [*Mansfield*, C. J. The Court clearly say, they rely on the want of a sea-passport, and the defendant's own evidence shews that they had not that.] No case has yet decided that such a sentence as this, not adjudicating the ground of condemnation, precludes evidence of what papers the vessel had, and what she had not; and by the evidence of the master it appears, that she had all necessary papers; but where occasion required it, he was at liberty to suppress them, because they would have subjected the ship to certain condemnation under the *Berlin* decree, and it does not lie in the mouth of the underwriters to demand, that the captain shall have papers which would bring certain ruin on him and on themselves. *Cessante ratione, cessat lex*. It was formerly necessary that an *American* or other neutral ship should be documented as such. Why? For her protection, and in order to exempt her from the perils of war; because without such documents she could not enjoy the benefits of her neutrality when captured by a belligerent. Formerly an *American* or other neutral ship, duly documented, could freely pass the seas; but now, since the *Berlin* decree, she would be completely destroyed by those documents which prove her neutrality: they would ensure certain confiscation. The law is not so absurd as to pronounce always the same judgment upon the same facts, when the reasons that make the judgment applicable to the facts cease: it makes no difference that this was a capture not by the *French*, but by the *Danes*, for it is notorious that since the *Berlin* decree all the continent of *Europe* is regulated by the same practice, whether legal or illegal. It was moreover both lawful and incumbent on the master to take measures for his protection against *French* capture, the risk most to be dreaded of all which were covered by this insurance, although in the event it happened that the loss was occasioned by a *Danish* force.

*Marshall* and *Vaughan*, Serjts. *contra*. There are three grounds of defence in this case. First, that the ship had not sufficient documents on board. Secondly, that the *Danish* sentence of condemnation is conclusive evidence that she is not, for the purposes of this policy, neutral, but enemy's property: and thirdly, that she had on board simulated papers, without any licence either expressed or implied. 1. Every ship possesses some

1810.

STEEL  
v.  
LACY.

[ 294 ]



1810.

STEEL

T.

LACT.

[ \*295 ]

some national character, and it is necessary for her to comply with those regulations \* which are laid down in order to distinguish her country; and for want of such compliance she is liable to be detained or confiscated. *Rich v. Parker*, 7 T. R. 705. *Barzillai v. Lewis*, 2 Park, (6 ed.) 469. And the sentence of condemnation is decisive evidence against her neutrality. *Saloucci v. Woodmass*, 2 Park, 471. *Bolton v. Gladstone*, 5 East, 155. and *ante*, 2. 85. The fabricated papers found on board, the false journal from *Guadaloupe*, the fictitious account of her voyage from *Bergen*, all of which are mentioned in the sentence, decisively disproved her neutral character. It never was before suggested that simulated papers might be carried without a licence. By the marine law of *Europe*, the circumstance of having fictitious papers on board is a lawful ground, at least of detention, if not of confiscation. Case of the *Welvaart*, 1 *Robinson*, 122. Case of the *Joanna Tholen*, 6 *Rob.* 72. *Mars*, 6 *Rob.* 79. Another ground, on which the defendant might safely rely in this case, is the spoliation of papers, which has always been held a ground of detention. *Rising Sun*, 2 *Rob.* 109., where Sir *W. Scott* lays it down as a general rule, that as far as freight is concerned, the owners were legally bound by the misconduct of the master, by the spoliation of papers. It is not within the province of the jury to find that simulated papers are indispensable to this voyage: at least their verdict cannot alter the marine law of *Europe*. If they are indispensable, yet they ought not to be taken on board, in contravention of that law without permission. The assured were guilty of a culpable concealment in not disclosing to the underwriters that it would appear upon examination of the ship's passport that she had come to *England* with naval stores, if that were really a ground of condemnation; but in truth there was no reason why the master should not produce these papers; the carrying goods contraband of war, is, by the law of nations, only a ground of condemnation, if the vessel be taken, while they are on board. [*Lawrence*, J. cc. But does not the *Berlin* decree confiscate all ships whatever coming from *London*?] Yes, but it is not in evidence that that law, made by the usurper of *France*, has ever been adopted by any other nation; and what is the received law of a foreign nation is a fact to be proved by evidence. The *Berlin* decree does not make the law of nations: it never was obligatory on, or adopted by, the *Danes*, *Swedes*, or *Russians*; nor was it the ground of this sentence of condemnation, which is very full and elaborate, and proceeds to

[ .296 ]

condemn the vessel on principles of general marine law only; the proof is, that although it four several times mentions her coming from *London*, which under the *Berlin* decree would alone be fatal, it contains not a hint that she was liable to condemnation upon that account. [Heath, J. acc.] It was clear that the master did not believe the *Berlin* decree to be received in *Denmark*, by his confession of coming from *London*. [Lawrence, J. It is not your point to disprove that these nations have adopted the *Berlin* decree, but that which you have to combat is the argument that the vessel being liable to capture and condemnation by the *French*, under the *Berlin* decree, it was necessary for her to be so documented as to avoid that danger.] If indeed the danger of *French* capture were the principal risk in this voyage, there might be more colour for the argument; but looking at the contract between the parties, the nature of the voyage, and the circumstances of the case, it is evident that *Danish* capture in the *Baltic* was the peril principally to be apprehended; and who can say that if this vessel had been fairly documented as a neutral, she would have been condemned in this case. Neither the practice of any man, or of any description of men, nor any change of circumstances, can alter the general law. [Mansfield, C. J. In the case of *Davies v. Powell*, *Willes* 46., which was trespass for distraining deer, Lord C. J. *Willes* says, "the argument *ab inusitato*, though generally a very good one, does not hold in the present case. When the nature of things changes, the rules of law must change too. When it was holden that deer were not distrainable, it was because they were kept principally for pleasure, and not for profit, and were not sold and turned into money, as they are now. But now they are become as much a sort of husbandry, as horses, cows, sheep, or any other cattle. Whenever they are so, and it is universally known, it would be ridiculous to say, that when they are kept merely for profit, they are not distrainable as other cattle, though it has been holden that they were not so, when they were kept only for pleasure."] There is no power in this country which can alter the marine law, except that the legislature may do it so far as regards our own practice. A foreign ordinance does not constitute a part of the law of nations. *Mayne v. Walter*, 2 *Park*, (6 ed.) 474. A *French* ordinance prohibited *Dutch* ships from carrying a supercargo belonging to any nation at enmity with *France*, and the vessel was condemned because she had on board an *English* supercargo. Our courts at once shrunk from the

1810.

---

 STEEL  
 v.  
 LACY.

[ 297 ]

1810.

STEEL

v.

LACY.

the idea of recognizing this ordinance as part of the law of nations, and said it was an arbitrary and oppressive regulation. *Pollard v. Bell*, 8 Term Rep. 434. confirmed the same doctrine.

*Cur. adv. vult.*

[ 298 ]

MANSFIELD, C. J. on this day delivered the opinion of the Court. The question is, whether the plaintiff is entitled to recover, or not; if not, a nonsuit is to be entered. This is an insurance on a voyage to *Riga*; in the policy there is no provision permitting the insured to use simulated papers, on which there has been a great deal of argument, but which, in the judgment I am going to give, one may almost leave out of the case; and on the evidence, I think it was quite improper for me to ask the jury what I did, respecting the necessity of simulated papers. At the same time, I give no opinion on what might be the case, if the same point was to arise on proper evidence; but there must be pretty strong evidence of the necessity of simulated papers, to induce the Court to give sanction to them. But the question I asked was also improper, because it was, as to what is now necessary; the jury took it for granted that the *Berlin* decree was adopted in *Denmark*, but on looking at the sentence, it is perfectly clear that the court in *Denmark* did not proceed on the *Berlin* decree, otherwise it would have instantly pronounced a sentence of condemnation on the first line of it; namely, that the ship came from *London*; that alone would have been sufficient. It is stated on the face of the sentence, that the want of the sea-passport was a ground of condemnation, and that the Court had no convenient, (meaning no sufficient) reason, to depart from this severity, the circumstances *in concreto* being all against the captain. For the reason I have mentioned, it is manifest that the *Berlin* decree could not subsist in *Denmark*, and that being so, the ship is in the common state of an *American* ship, which therefore ought to be documented as a neutral ship: it is quite ridiculous to talk of this ship being an *American*, if she is not to be documented as an *American* ship. We are of opinion therefore that the Rule must be absolute for a

Nonsuit.

ANNE

1810.

## ANNEN v. WOODMAN.

Nov. 26.

**T**HIS was an action upon a policy of insurance, at and from *Surinam* to *London*. Upon the trial of the cause at *Guildhall*, at the sittings after *Trinity* term 1810, before *Mansfield*, C. J., it appeared, that the vessel arrived at *Surinam*, and lay there a considerable time before she sailed, during which she took in a cargo of goods, of the value of 6000*l*. she sailed on the homeward voyage on the 1st of *August* 1808, but before she got down to *Braam's* point, at the mouth of the *Surinam* river, she grounded and was lost. The defence set up by the underwriters, was, that the vessel was not seaworthy; it was proved that the vessel broke ground without a sufficient complement of men for the voyage, and that she was leaky; the plaintiff endeavoured to shew, that the damage had been occasioned by accidentally striking on an anchor in the *Surinam* river; but some witnesses proved that the ship's timbers were rotten, whereupon *Best*, Serjt., for the plaintiff, said, he would admit that she was not seaworthy, and would take his verdict only for a return of the premium, and accordingly, without the case being summed up to the jury, a verdict passed generally for the defendant, upon the counts on the policy, without the jury specially finding what was the defect which rendered the vessel unfit for the voyage.

*Shepherd*, Serjt. in this term obtained a rule *nisi* to set aside the verdict and enter a nonsuit, upon the ground that the policy being "at and from *Surinam*," the ship was covered by the policy while she was there, for that the ship, though very defective in point of repair, or though destitute of hands, was sufficiently seaworthy to lie alongside of a quay in a river, and that if she were seaworthy for the place and service in which she was then engaged, the policy attached on her while she was in that port, and the risk having once commenced, this was not a case in which the premium could be apportioned, but that the benefit of the policy became forfeited so soon as the ship proceeded on a service for which she had not been previously rendered seaworthy, and the premium remained entire to the defendant.

*Best* and *Vaughan*, Serjts. now shewed cause. If the plaintiff meant to put his case upon the deficiency of men only, he should have distinctly put it so to the jury; but after they have found a general

A ship is seaworthy, if she is sufficiently furnished for the service in which she is for the present time engaged.

Therefore, a ship much out of repair is seaworthy in harbour, and is protected under the word "at."

And as a full complement of men is not necessary in harbour, she does not cease to be seaworthy for want of a crew till she sails on the voyage without a crew.

If a ship, seaworthy to lie in port, sails without being rendered seaworthy for the voyage, upon a policy "at and from," there can be no return of premium.

[ 300 ]

1810.

ANNEN

v.

WOODMAN.

general verdict, the plaintiff cannot separate the facts, and say the ship was seaworthy "at" *Surinam*, but not seaworthy "from" thence. The complement of men might be sufficient at the port, although it was not sufficient to sail from thence, but if the fabric of the ship was not seaworthy for the voyage, it was not seaworthy "at" *Surinam*, for it was not repaired there. [*Lawrence*, J. Suppose the vessel had been burnt in the harbour at *Surinam*, would not the plaintiff have been entitled to recover as for a total loss? It is not necessary that at the time of the contract the vessel should be seaworthy for the voyage: suppose a ship repairing is burnt, would she not be on the policy under the word "at"? The condition that she shall be seaworthy for the voyage does not attach till her sailing.] The jury having generally found that the ship is not seaworthy, the plaintiff is entitled to a return of premium. The judgment of *Lawrence*, J. in the case of *Christie v. Secretan*, 8 *T. R.* 198. is strong to this effect. As to the defect of seamen, at the very time of the loss, the captain was on shore endeavouring to get more seamen, and the vessel had not proceeded on her voyage to the point where it became necessary to take on board the full complement. [*Mansfield*, C. J. denied that there was any evidence given of an intention to take on board more seamen.]

[ 301 ]

*Shepherd* and *Peckwell*, Serjts., in support of the rule, insisted that the jury were clearly satisfied of the deficiency in the complement of men, and that their verdict proceeded upon that ground. That defect did not arise till she left the port; and unless it had appeared that the vessel was so rotten that she was unfit to lie in harbour, the policy had attached long before the deficiency of men arose, and there could be no return of premium. The ship, although in want of repairs, was, without receiving any repairs, protected by the policy whilst in the port.

*MANSFIELD*, C. J. This is a question in fact about the costs, but there was very little discussion at the trial on the latter points. The question is, whether on an insurance at and from *Surinam*, the facts of this case entitle the plaintiff to a return of premium. Now if the ship sailed without a sufficient number of men, certainly they do not. This case never went to the jury, but I believe they were perfectly clear on both grounds; as to the number of men, they certainly were. But with respect to the other point, here is the ship kept a month at *Surinam*,

*Surinam*, in loading, and to all appearance, in the judgment of mankind, certainly seaworthy, and if she had been sunk or burnt there, the underwriters could have made no defence. And it would be very strange if this plaintiff can say, on its being proved that the ship was not seaworthy when she finally sailed, that therefore the seaworthiness shall be carried back to the time of her arrival at *Surinam*.

1810.

ANNEN  
v.  
WOODMAN.

Rule absolute for a nonsuit.

BLAGRAVE, Demandant; OWEN, Tenant; BLAGRAVE  
and Others, Vouchers.

[ 302 ]

Nov. 26.

SELLON, Serjt. moved that a recovery might pass as of this term. The warrant of attorney acknowledged by one of the vouchers, was taken before two commissioners, one of whom was described in the affidavit as an attorney of His Majesty's Court of Great Sessions at *Chester*; the other was an attorney of one of His Majesty's Courts at *Westminster*. The rule of Court, *Mich. 39 G. 3.* requires that no fine or recovery shall pass, unless the taking of the warrants of attorney shall be before a Judge or Serjeant, or unless an affidavit be made and filed, stating that commissioners taking the same, are either barristers of five years' standing, or solicitors, or attorneys, of some of the courts of *Westminster-Hall*, the Judges of the Court of Session or Exchequer, or Advocates, or Clerks to the Signet, of five years' standing, in *Scotland*. But this rule, he said, applied only to recoveries suffered of lands in *England*; and the premises in the present case were in the county palatine of *Chester*, which, he argued, was not within the reason of the rule, and was not, for this purpose, *quasi-England*. The Court were unanimous that *Chester* was in *England*, and refused either to let the recovery pass as of this term, or to let the tenant's appearance be recorded as of this term, *de bene esse*, which he next prayed for.

The warrant of attorney to suffer a recovery of lands in a county palatine, cannot be taken before an attorney of the Palatinate Court of Great Sessions.

1810.

Nov. 26.

## HADDOW v. PARRY.

A bill of lading, signed by a master of a vessel, since deceased, for goods to be delivered to a consignee or his assigns, he paying freight, is admissible as evidence of the consignee having an insurable interest in the goods. Per *Lawrence, J.*

But if the master guards his acknowledgment by saying, "contents unknown," so that he does not charge himself with the receipt of any goods in particular, the bill of lading alone is not evidence, either of the quantity of the goods, or of property in the consignee.

[ 304 ]

THIS was an action upon a policy of insurance effected by the plaintiffs, therein declared to be agents, "upon specie or bullion, by any one or more of His Majesty's ships, lost or not lost, at and from *Jamaica* to *England*. The interest was averred to be in *James Auchie* and Co. Upon the trial of this cause, at the sittings after the last *Trinity* term, at *Guildhall*, before *Mansfield, C. J.*, a bill of lading was offered in evidence, signed by Lieutenant *Lawrence*, the commanding officer of His Majesty's schooner the *Rook*, of eight guns and twenty-five men, accompanied with proof of his death and hand-writing. In the margin was written, Bill of lading for 12,000 dollars, dated 12th *August* 1808, under which were copied the marks of the several chests, and their numbers and contents, describing them as containing 2,000 dollars each. The body of the bill of lading expressed to be "shipped in good order by *Dollar Auchie* and Co., in and upon the good schooner called the *Rook*, six boxes, containing 12,000 dollars, being marked and numbered as in the margin, to be delivered at *London*, (the act of God, the King's enemies, fire and all and every other the dangers of the seas, rivers, and navigation, of whatever nature and kind excepted,) unto Messrs. *James Auchie* and Co. or to their assigns, they paying freight. In witness whereof the master or pursuer of the said schooner had affirmed to four bills of lading of like tenor. This instrument was signed, "contents unknown, *James Lawrence*, Lieutenant." The *Rook* was taken on the homeward passage by a very superior force, after a most gallant resistance, in which Lieutenant *Lawrence*, and four-fifths of his crew, were slain, and the survivors taken prisoners. The plaintiffs produced no other proof of the contents of the chests, nor of interest in *James Auchie* and Co. than this bill of lading. At the trial no attention was paid to the protest of the master, signed at the bottom, "contents unknown;" but upon the whole effect of the instrument it was contended that it was no proof that the property was put on board, or that it belonged to *James Auchie*: and the Chief Justice being of that opinion, rejected the evidence, and directed a nonsuit.

*Shepherd*, Serjt. in this term obtained a rule *nisi* for a new trial, upon the ground that this evidence ought to have been received, it being similar to the entries of bailiffs in their accounts, and

and other entries whereby persons charge themselves, which are admitted as evidence of the facts which they state. The deceased must be considered as a steward for his owners. [*Mansfield*, C. J. thought that the case of entries made by a dead vicar or rector, which the Court of Exchequer had long been in the habit of receiving, as evidence in favour of his successor, might be analogous.]

*Lens* and *Vaughan*, Serjt. on a former day in this term shewed cause. They distinguished this from the case of a bailiff charging himself. They did not object to the bill of lading being received as evidence that the goods were put on board the vessel, but they objected to the ulterior use intended to be made of it, as declaratory of the persons in whom the property was vested. But even admitting that any declaration made between the consignor and the master would be evidence, this paper does not contain any declaration in whom the property is, for it is merely an undertaking to deliver to *James Auchie* and Co., or their assigns, so that whether the dollars belong to *James Auchie* and Co., or to *Dollar, Auchie* and Co. or to any other, does not by this paper appear. It is only evidence that the deceased master undertook to render an account to *James Auchie* and Co. The entry of a bailiff is only evidence of the precise fact that the tenant does pay rent for that land, it proves nothing further. That too is an excepted case, and no analogy can be drawn from excepted cases, it would only be extending the exception. [*Heath*, J. Does not the master charge himself in this case with the receipt of the dollars?] Yes, but the paper only proves that he received them from *Dollar Auchie* to be delivered to *James Auchie*; it does not prove in which of the two the property is vested. [*Lawrence* J. You admit that in an action against third persons, this bill of lading would have been evidence of the receipt of the dollars by the master: would it not then have been equally evidence of property in the consignee in an action of trover for them against a third person, and not against the captain only? Could *James Auchie* (to whom, or whose assigns, the master undertakes to deliver the dollars,) assign them, if he had no property in them.] The authorities were very much considered in the late case of *Higham v. Ridgeway*, 10 *East*, 109. But it is not sufficient for the purpose of the present action, that this would be evidence to enable *James Auchie* to recover in trover: in the cases of *Camden v. Anderson*, 5 *Term Rep.* 712, and *Lucena v. Crawford*, 3 *Bos. & Pull.* 75. it was held

1810.

HADDOW  
v.  
PARRY.

[ 305 ]



1810.

—  
HADDOW  
v.  
PARRY.

[ 306 ]

held that a person must have either the legal or the equitable title to goods, to enable him to support a policy of insurance, so that this paper may be evidence of a less than an insurable interest in *James Auchie*. {*Chambre, J.* I see in the margin, the words "contents unknown;" it seems that the lieutenant who signed this, would not charge himself with any thing, and would not be accountable. *Mansfield, C. J.* Those words were not read or noticed at the trial. If the master qualifies his acknowledgment, by the words contents unknown, he acknowledges nothing.]

*Shepherd and Best, Serjts. contra.* The principle on which the admissions of persons against themselves are evidence, is not confined to written entries. Proof of a declaration made by a man now dead, or proof of a written entry made by him, are alike tantamount to his being, if alive, called into the witness box, and saying, I received these boxes of dollars, contents as per margin, and I received them for the use of *James Auchie*. In the case of *Mac Andrew v. Bell*, 1 *Esp.* 373., Lord *Kenyon* held that the admission of the master of a vessel put into the witness box of his signature to a bill of lading consigned to the plaintiff, was proof of interest in the plaintiff upon a policy of assurance. The case of a steward is only *exempli gratia*, but entries are often evidence not only against, but for the maker. In the ordinary case of a bond, more than twenty years old, the obligor charges himself, by indorsement, with receipt of the interest, but this is so strongly evidence for himself, that it will, at a subsequent period, rebut the presumption of payment, because the plaintiff is in the like case as a dead man, and cannot be called as a witness.

*Cur. adv. vult.*

On this day the Court declared that the words, "contents unknown," rendered the bill of lading no declaration of what the chests of dollars contained: it was therefore no evidence at all, and they

Discharged the Rule.

1810.

Nov. 26.

## WILSON v. SERRES.

**MARSHALL**, Serjt. having obtained a rule *nisi* to discharge the defendant, who was a married woman, out of custody,

**Best**, Serjt. shewed cause, upon an affidavit that she contracted for the purchase of furniture, (for the price of which this action was brought,) as a single woman; and that when she disclosed that she was married, she also stated that she was separated from her husband, and had estates settled to her own separate use, and was answerable for payment of her own debts, and actually gave a bill of exchange for the amount of the debt, which was dishonoured.

**Marshall**, in support of his rule. The plaintiff knew she was married when he arrested her.

The Court held that as he knew she was married, the taking bill of exchange, and the arrest, were very wrong, and therefore made the

If a plaintiff knowingly arrests a married woman, the Court will make him pay the costs of the motion for her discharge.

Rule absolute with Costs.

## GIBBS v. MERRILL.

Nov. 27.

THE plaintiff declared on a bill of exchange, drawn by himself, and directed "to the defendant, by and under the firm and description of Messrs. *Merrill and Le Blond, London*," which bill the defendant afterwards accepted. The defendant pleaded an abatement, that the supposed promise, if any such was made, was made by the defendant and one *Robert Le Blond*, jointly, and not by the defendant solely, which *R. Le Blond* was still alive. The plaintiff replied, that the promise was made by the defendant solely, and not by the defendant and *Robert Le Blond* jointly, whereon the defendant joined issue. Upon the trial of this issue, at *Guildhall*, at the sittings after *Trinity term*, 1810, before *Mansfield*, C. J., it was proved that *R. Le Blond* was party to the bill, but that he was an infant: the bill was accepted for the price of goods sold by the plaintiff to the defendant and *Le Blond*, who were partners in trade. *Le Blond*, being called, proved that he had never rescinded the contract. The jury found a verdict for the plaintiff.

**Shepherd**, Serjt. in this term obtained a rule *nisi* for a new trial,

In *exemptis* a plea in abatement that the [ 308 ] defendant made the promise jointly with another, is supported by evidence that the promise was made by the defendant jointly with an infant.

It is for the plaintiff to plead and prove that the infant has avoided his promise, if he would reduce the joint contract to a sole contract.

1810.

GIBBS

v.

MERRILL.

trial, upon the ground, that *R. Le Blond* did promise, although his promise was voidable, and that it was proved that he had not avoided his promise.

[ 309 ] *Lens*, Serjt. on a subsequent day shewed cause. This is not a mere issue on the fact whether this bill were signed by the defendant only, or by the defendant and *Robert Le Blond* jointly, which can be decided by looking at the face of the bill; if this be not in law the contract of the infant, it may be pleaded as the contract of the adult party alone. It is not the less the contract of the defendant alone, because another person has joined in it, whom the law will not permit to contract: when the fact of infancy is established, the infant ceases to be a joint-contractor: the issue therefore is rightly drawn, and proved according to its legal effect, 3 *Esp.* 76, *Chandler v. Parkes* and *Dankes*. In an action of *assumpsit* against two, upon the general issue pleaded, the plaintiff entered a *nolle prosequi* against one, who was an infant; and at the trial, Lord *Kenyon*, C. J. held, that having declared upon a joint-contract, he could not recover against one defendant only, when it was disclosed that the other was an infant, *Jaffray v. Freebairn, Wilson, & Black.* 5 *Esp.* 47. *Assumpsit* on a promise to carry the defendant safely; *Black* pleaded infancy, on which the plaintiff entered a *nolle prosequi* as to her. The other defendants pleaded, that they, together with the defendant *Black*, did not undertake. Upon the trial, Lord *Ellenborough*, C. J., on the authority of *Chandler v. Parkes*, nonsuited the plaintiff. *Trueman v. Hurst*, 1 *T. R.* 40., held that an action on an account stated, does not lie against an infant. [*Heath*, J. In *Carth.* 160., *Williams v. Harrison*, it was held that it was a good plea in bar to an action upon a bill of exchange, though drawn by a trader, that he was an infant. *Lawrence*, J. In *Trueman v. Hurst*, the Court only held that the infant should not be bound by the admission he had made during infancy, that the note was given for necessities.] The judgment proceeds on the form of the count, that a plaintiff can only recover against an infant upon a count expressly framed for necessities found. [*Lawrence*, J. No count ever expressly states that the defendant is an infant.] 1 *Campb.* 552., *Williamson v. Watts*, infancy being pleaded to an action against the acceptor of a bill, the defendant replied, it was accepted for necessities, and *Mansfield*, C. J. thought the action could not be maintained, and that the replication ought to have been demurred to, because an infant could not be liable as the acceptor of a bill. The argument for

the defendant is, that no third person can elect for the infant, nor he shall rescind his contract, and that he has not made election himself; but that argument is grounded \* on the erroneous position, that a bill of exchange given by an infant, is void, but merely voidable: and at the trial *Taylor v. Croker*, 1810, was cited. But the case in *Carthew* shews that it is utterly void. There is a distinction taken between bonds and single bills, because the bond has its operation by delivery, therefore it shall take effect, unless infancy be pleaded to it. *Russel v. Lee*, 1 Lev. 86.

*Shepherd* and *Best*, Serjts. contra. The issue was proved with respect to the defendant. An infant is capable of contracting: he may make the contract, but he also may, when he becomes of age, annul it; if he contracts for necessities, even during infancy, it is a complete binding contract; and the cases cited for the contrary are consonant to this doctrine: the infant may bind himself for necessities, he cannot bind himself by any new contract arising out of the contract for necessities, as a bill, &c.: he cannot avoid it. The case put, of a bond, is conclusive for the contrary; for if the contract of an infant were *ipso facto* void, he might give infancy in evidence on the plea of *non est factum*, but it is never permitted. Every thing which avoids a deed *ex facto* must be specially pleaded: infancy must be pleaded to it, and it is not long since the practice ceased of pleading infancy specially in actions of *assumpsit*. A promise by an infant is not a nullity; it is at all times a good consideration to support a promise by another person to the infant. The promise of a feme covert is not such a consideration. [*Mansfield*, C. J.]

This marks the distinction between a void and a voidable contract, *Holt v. Clarencieux*, 2 Str. 938., *Assumpsit* on a breach of promise of marriage: the defendant pleaded that at the time she made the promise the plaintiff was an infant of fifteen years, to which plea the plaintiff demurred, and it was urged that it was void *ex pacto*, because the infant had the right of disagreeing to contract at full age, and therefore her promise could be no consideration for the defendant's promise: but *Holt*, C. J. held the promise to be not void, but only voidable at the election of the infant, but that the party with whom an infant contracts has this election, but is bound in all events, and judgment was given for the plaintiff upon the demurrer. But if the promise of an infant were absolutely void, it could be no consideration for the promise of another. [*Mansfield*, C. J. I do not know that: VOL. III.

1810.

GIBBS

v.

MERRILL.

[ \*310 ]

[ 311 ]

1810.  
 —  
 GIBBS  
 v.  
 MERRILL.

an obligation in honour is a consideration for a promise, though the honorary obligation cannot be enforced.] If is there nothing but an honorary obligation on the one side, and a legal obligation on the other, the honorary obligation is nothing, and cannot be enforced: there must be a promise founded on it: but there is in this case the promise of the infant, voidable but not void. That which is void is nothing, it does not exist: that which is voidable, may be rendered null by some subsequent act by the infant himself only, but it is also capable of confirmation by him. That which does not exist is not capable of confirmation. Perhaps even after the cause is decided on that ground, the infant may confirm his promise. It might have been competent to the plaintiff to shew in pleading, if the case had been such, that the defendant promised jointly with another, who was an infant, and that the infant had since avoided his contract, so that the defendant continued liable alone; and it is important that it should be so pleaded, for many cases have happened in which the infant has afterwards ratified the contract, but it is not true that the defendant originally promised alone. [*Mansfield*, C. J. Shall the defendant, who, the other party to the bill be an infant, has practised a gross fraud on the plaintiff, in passing to him a bill, to which he has procured an infant to set his name, be permitted to take the objection?] It does not follow that the defendant is guilty of a fraud in so doing: it is not of necessity that he knew the other was an infant; the infant may, when he comes of age, ratify the contract; but if he avoids it, that does not the more prove it to have been a void contract in the commencement. But at all events it is not competent for a stranger to come in and say that the contract made by the infant is void in law. If the infant declares he does not chuse to make the objection of infancy, and to call for the protection of the law, another cannot do it for him. *Taylor v. Croker*, 4 *Exp.* 187. *Assumpsit* against the acceptor on a bill drawn by *Eversfield* and *Jones*, payable to the drawers, and by them indorsed to *Sizeland*, and by him to the plaintiff. The defendant proved that both the drawers were under age, and that they delivered the bill to *Sizeland* to be discounted, who had misapplied the money to his own use. *Eversfield* had demanded the bill from the plaintiff, who refused to give it up. The defendant contended that under these circumstances the note was void, but Lord *Ellenborough*, C. J. thought, that if the action were against the drawers, there

[ 312 ]

might be weight in the objection; for they might claim from the Court the protection of their infancy; but that though the defendant derived title under them, the note was not to be considered as void in his hands, because the infants might possibly make themselves liable by a subsequent confirmation of their engagement, after full age. If the plaintiff may not now declare upon the joint contract and recover, it would follow that if, after the infant came of age and confirmed his contract, the plaintiff should still sue the other defendant only, that defendant would have no right to insist that the joint contractor ought also to be sued along with himself, but would be put to his separate action afterwards for contribution.

*Lens* replied, upon the case of *Holt v. Clarencieux*, that the plaintiff did not bring that action until after she had attained twenty-one years, and confirmed her contract; the plaintiff in this case, if he would have the contract not void, might have waited till *Le Blond* has attained twenty-one, and seen whether he would confirm this contract; but in the mean time he is entitled to sue only the defendant.

*Cur. adv. vult.*

Upon this day, *Mansfield*, C. J. (in the absence of the reporter,) gave judgment (a).

If the defendant and *Le Blond* had both been sued and had pleaded *non assumpsit*, the verdict must have been for the defendant, because the contract is void as against one. It is a gross fraud if the defendant knew the other to be an infant, but I am afraid the cases are in favour of the defendant. The plaintiff has not taken the right course to enforce the bill. I never could understand the rule of law that an infant's contract was not void, but voidable. The rule that he is liable for necessities, is plain enough: but it does not seem clear, in other cases, in what manner he is to avoid his contract. He may do it, indeed, by plea, but it does not seem necessary that he should do any previous act to avoid it. It seems, however, that the contract is not void, till the infant says that it is void. If it is not void, on this plea in abatement, we cannot say that the contract was not made by two persons. Therefore the verdict is wrong. According to a case in 2 *Vin. Abr.* p. 68. tit. *Actions, Joinder*, (D. d.) pl. 8., which cites *Bro. Ab. Dette* 191. (*perperam*)

1810.

GIBBS

MERRILL.

[ 313 ]

(a) *Ex relatione Servientis Peckwell.*

1810. (*perperam* 190) (*b*), the plaintiff should have replied that \* the other joint contractor was an infant, and the defendant must either have admitted it, or denied it.

GIBBS  
v.

MERRILL.

Rule absolute for new trial.

[ \* 314 ] *Lens* then obtained a rule *nisi* for liberty to amend his replication.

(*b*) The case in *Bro. Ab. Dette* 191. (*perperam* 190.) is as follows.

DEBT on bond by the Abbot of D., who shews that the bond was made to himself and to *J. N.*, and that *J. N.* was his commoign at the time, &c.; and therefore it was held to be well by the Court, for there is a diversity where a bond appears to be void, and where it does not: for where an infant and a man of full age were bound, or a feme covert by a strange name, there the action shall be brought against both, and they shall have advantage by way of plea of the non-age, coverture, and profession; but where one of them is named feme covert or commoign in the bond, there it is otherwise; for in the first case the infant may admit the bond, and so may the woman after the death of her husband, and the monk after his deraignment; but where a man is bound to the Abbot and *J. N.*, not styling him monk in the bond, nevertheless the Abbot alone shall have the action, and shall surmise that the other obligee was his commoign at the time, &c.; which note, for the judgment; and if one be bound to two, and one of them die, the other shall have his action alone, and shall surmise in his count that the other is dead; and if two are bound to one, and one of the two dies, the obligee shall have his action against the other, and shall count that the other obligor is dead. Cites "32 H. 6. 30." The folio cited seems not to be in point, and is probably a mistake for "*Mich. term* 32 H. 6. pl. 6. The prior of *Ely* sued out a writ against a man, and counted by *Wangforde*, that the defendant was bound to himself and to one *J.*, his co-canon, a sacrist of the same place, in the sum contained in the bond; and shewed besides, that the sacrist was his co-canon, for that the bond was made to himself and such an one, sacrist of the same place. *Littleton*, for the defendant, pleaded a prescription for all the sacrists of the same place, to be impleaded and to plead: and the question was whether the plea were well pleaded by way of prescription; no objection being made to the declaration; *Littleton*, by the advice of the Court, imparled.

[ 315 ]

Nov. 28.

ANONYMOUS.

A motion to put off a trial in *London* or *Middlesex* on account of the absence of a witness cannot be made when there is not time to shew cause within the term, if the party applying, had it in his power to come earlier.

*BEST*, Serjt. moved on this last day of the term, for a rule *nisi* to put off the trial of this cause, for the absence of a material witness, who six weeks since went to *Morpeth* in *Northumberland*; the notice of trial was given on the 21st of *November*, for the *Middlesex* sittings after this term. Notice of this motion was given to the opposite party on the night of the 27th.

MANSFIELD

MANSFIELD, C. J. The intention of the rule of practice is, to prevent the time of the judge, who sits at *nisi prius*, from being occupied with discussing these motions. But if a rule *nisi* is granted now, cause must be shewn at *nisi prius*, which equally occupies the time of the Judge: the having given him notice last night, is not sufficient to bring him into Court this morning to shew cause: you might have made this motion a week since, and then he would have had sufficient time to shew cause within the term.

1810.

ANONYMOUS.

Rule refused.

PHILIP THOMAS WYKHAM, Esq. v. SOPHIA ELIZABETH WYKHAM and Others. [ 316 ]

Nov. 28.

THE Right Honorable Philip Lord Wenman being seised in fee of divers real estates, and entitled in fee to the equity of redemption of certain other real estates, then mortgaged in fee to *Agatha Child*, by his will, dated the fourth day of May 1758, and duly executed and attested, devised part of the same several estates to *George Harvey* and *Francis Basset*, and their heirs, upon trust, by and out of the rents and profits, or by sale, from time to time as to them should seem most convenient, and also by virtue of the power thereafter given to them to cut, sell, and dispose of coppice woods, to raise money sufficient to discharge such of the testator's debts and legacies as his personal estate would not be sufficient to pay; and as for such parts of the hereditaments so given to the trustees, which should remain after the trusts should be performed, he devised them, and all other his freehold hereditaments in the counties of *Oxford*, *Kent*, and *Bucks*, or elsewhere in *England*, to his eldest son the Honorable *Philip Wenman*, for his life, sans waste; with remainder to *Thomas Whorwood*,

The testator devised certain lands, part mortgaged in fee, and part unincumbered, to trustees and their heirs, to pay debts in aid of the personal estate, and devised the surplus, and all his other lands, &c. to his first and other sons successively for life, with successive remainders to trustees and their heirs, to preserve subsequent estates during the lives of the several tenants for life, with several remainders successively to the first and other

sons of the bodies of the testator's several sons, in tail male, with like remainders to his daughter for life, to trustees, &c. and to her first and other sons successively in tail male, with a proviso that each of the testator's sons, as he came into possession, might from time to time grant or appoint all or any part of the lands whereof he should be so seised and possessed, to trustees, on trust by the rents and profit to pay a jointure to any wife, &c. for the term of each such wife's natural life only. There were also powers by deeds to charge the lands with younger children's portions, and to lease for 21 years. While the mortgages remained outstanding, and the trusts for payment of debts unperformed, the eldest son, by deed, reciting the will and power, conveyed lands to trustees and their heirs, on trust by the rents and profits to raise and pay a jointure to his wife, during her natural life only; and charged the lands with portions for younger children, if any; which deed also contained a covenant for quiet enjoyment against the settlor and testator, during the wife's life: This Court held that by such deed the trustees of the jointure took no legal estate.

and



1810.  
 ———  
 WYKHAM  
 v.  
 WYKHAM.  
 [ \*317 ]

and *John Clarke*, and their heirs, during the life of \* *Philip Wenman*, to preserve subsequent estates; with remainder to the first and other sons, successively, of the body of *P. Wenman* and their heirs male; with remainder over, for default of male issue, to *Thomas Francis Wenman*, his youngest son, for his life, sans waste; with remainder to the same trustees and their heirs, during his life, to support the subsequent remainders; with remainder to his first and other sons successively in tail male; with remainder to the testator's third and other sons successively in tail male; with remainder in default of all such his issue male, if he should have any other daughter than *Sophia Wenman*, to his daughter *Sophia* and such other daughters in tail general, as tenants in common, and if no other daughter than *Sophia*, then to her for life, sans waste; with remainder to the same trustees and their heirs during her life, to preserve contingent remainders; with remainder to her first and other sons in tail male, with divers remainders over, and with the ultimate remainder to the right heirs of the testator. The will contained a proviso, "that it might be lawful for each of his sons, *P. Wenman* and *T. F. Wenman*, and every other his son, when and as they should respectively become entitled to the premises or any part thereof, in possession, from time to time to grant, convey, limit, or appoint all or any part or parts of the premises whereof they should respectively be so seised and possessed, to trustees, upon trust, by the rents and profits thereof, to raise and pay any yearly rent-charge not exceeding the sum of 1000*l.*, for a jointure for any wife or wives that he or they should happen to marry, for the term of each such wife's natural life only; and a further power for them, in like case, by any deed or deeds, &c. or by his, or their, or any of their will or wills, &c. to charge all or any part or parts of the premises whereof he or they should be so severally seised and possessed, with sums of money for daughters or younger children's portions; (that is to say,) for one such daughter or younger child, five thousand pounds; for two such, eight thousand pounds; and for three or more, ten thousand pounds; with such maintenance, not exceeding the interest of the respective portion or portions at four *per cent.*, as his sons should respectively by such deed or deeds, will or wills, appoint." There was also a proviso, "that it might be lawful for his sons, when and as they should come into possession of the hereditaments so devised to them for  
 " life,

[ 318 ]

“ life, by indenture to lease all or any part or parts thereof for  
 “ any term of years not exceeding twenty-one years in posses-  
 “ sion, so as in every such lease there should be respectively  
 “ reserved and made payable during the continuance thereof,  
 “ to be incident to and go along with the reversion or remainder  
 “ of the premises, and expectant thereon, so great a yearly  
 “ rent as could be reasonably gotten.” The testator died in  
 August 1760, leaving two sons only, viz. *Philip Lord Wenman*,  
 and *Thomas Francis Wenman*: and one daughter, *Sophia*  
*Wenman*. *Philip Lord Wenman*, the son, became of age in  
 April 1763, and was thereupon let into possession of all the  
 testator's real estates, and enjoyed them till his death. In 1766,  
 by indenture tripartite, duly attested, dated the 28th June 1766,  
 and made between *Philip Lord Viscount Wenman* of the first  
 part, *Lady Eleanor Bertie* of the second part, and *Willoughby*,  
*Earl of Abingdon*, and *John Morton*, Esquire, of the third part,  
 whereby reciting the said recited will, and the proviso whereby  
 he was entitled to make a jointure out of the said estates upon a  
 wife, and to make a provision for daughters or younger children;  
 and that a marriage was then intended to be shortly had  
 between *Lord Wenman* and *Lady Eleanor Bertie*, and for  
 making such jointure for her in case she should after the  
 marriage survive her intended husband, as he was empowered to  
 make by virtue of the same will, he, the said *P. Lord Viscount*  
*Wenman*, pursuant to and by force and virtue of the said power,  
 and of all other powers, &c. did grant, convey, limit, and ap-  
 point, unto the *Earl of Abingdon* and *John Morton*, all his  
 hereditaments devised to him by the said will in the counties of  
*Oxford* and *Bucks*, or elsewhere in *England*, to hold the same  
 hereditaments unto the said *Lord Abingdon* and *John Morton*,  
 and their heirs, upon trust by the rents and profits thereof to  
 raise and pay unto the said *Lady Eleanor Bertie* and her assigns,  
 during her natural life only, the yearly rent-charge of 500*l.*, by  
 quarterly payments, clear of all reprises, for her jointure, in  
 case the marriage should take effect, and she should survive  
*Lord Wenman*, and to be in bar and satisfaction of dower: and  
 in consideration of the marriage, and for the making such pro-  
 vision for his daughter or daughters, younger child or children,  
 as he was in that case authorized and empowered to make by  
 virtue of the said recited will, the said *P. Lord Wenman*, pur-  
 suant to and by virtue of the said recited power, and of all other  
 powers, &c. did by such deed charge all the premises in *Oxford*  
 and

1810.

WYKHAM  
 v.  
 WYKHAM.

[ 319 ]

1810.  
 ———  
 WYKHAM  
 v.  
 WYKHAM.

[ 320 ]

and *Bucks*, devised by the said recited will, (subject to the said jointure,) with the payment of the several sums therein mentioned. And the settlor covenanted with the trustees, their heirs and assigns, that he then had in himself good right, full power, and lawful and absolute authority, to make such grant; settlement, limitation, appointment, and charge; and further that the said trustees, in case the intended marriage should take effect, and the said Lady *Eleanor Bertie* should survive him, should, from time to time and at all times after his decease, during her natural life only, peaceably and quietly enter into and enjoy the premises thereinbefore granted, limited, and appointed to them as aforesaid, and receive and take so much of the rents and profits thereof as should be sufficient to pay the yearly rent-charge of 500*l.*, without the lawful let, eviction, or interruption of the settlor, his heirs or assigns, or any claiming under or in trust for him or the late Lord *Wenman*. By indenture of the 26th day of *December* 1782, and made between the settlor, and the Earl of *Abingdon* and Sir *J. W. Gardiner*, Bart., duly attested, reciting the aforesaid will and settlement, and that Lord *Wenman* was desirous to make a further provision for Lady *Eleanor Wenman* of the clear yearly rent-charge of 300*l.* a year, in addition to the sum of 500*l.* a year before settled, for making such further jointure, the settlor pursuant to, and by virtue of the same jointuring power, and of all other powers, &c. and in further exercise and execution thereof, did grant, convey, limit, and appoint, unto the said Earl of *Abingdon* and Sir *John Whalley Gardiner*, and their heirs, all such parts of the hereditaments, devised to the settlor by the said recited will as were situate in the county of *Oxford*, to hold the same hereditaments unto the trustees and their heirs, upon trust, by the rents and profits thereof to raise and pay unto Lady *Eleanor Wenman* and her assigns, during her natural life only, the further rent-charge of 300*l.*, as and for an addition to the jointure of 500*l.* secured to her by the therein-recited indenture, in case she should survive her said husband, with the like covenants as in the last-recited deed, for the settlor's right to make such further grant, limitation, settlement, appointment, and charge, and for quiet enjoyment by the trustees against the settlor and the testator. And by another similar indenture, dated the 1st of *December* 1796, and made between the said settlor of the one part, and Sir *William Henry Ashurst*, Knt. deceased, and Sir *John Whalley Gardiner* of the other part, the settlor further granted,

granted, &c. unto the last-mentioned trustees and their heirs, so much of the hereditaments devised to him by the said will, as were situate in the \* county of *Oxford*, and in *Pounden*, in the parish of *Twyford*, in the county of *Bucks*, to hold unto the trustees and their heirs, upon trust, by the rents and profits thereof, to raise and pay unto *Eleanor Lady Wenman* and her assigns, during her natural life only, the further yearly rent-charge of 200*l.*, as and for an addition to the jointure of 500*l.* and 300*l.* before secured to her, with the like covenants as in the last-mentioned indenture. *Thomas Francis Wenman*, the second son of the testator, died in 1796, unmarried, and without issue, in the lifetime of *P. Lord Wenman*, his brother, and on the 26th of *March* 1800, the same *Philip Lord Wenman* died, without leaving any issue, and leaving *Eleanor Lady Wenman* him surviving. *Sophia Wenman*, the only daughter of the first named *Lord Wenman*, intermarried with *William Humphrey Wykham* deceased, and having survived him, she died in *March* 1792, leaving issue, *William Richard Wykham*, her eldest son; *Philip Thomas Wykham*, the plaintiff; and *Harriet Mary Wykham*, who intermarried with *Willoughby Bertie*, one of the defendants. By indentures of lease and release, of the 1st and 2d days of *January* 1799, the release made between *William Richard Wykham* of the one part, and *William Walford*, gent. of the other part, the said *William Richard Wykham* conveyed to the said *W. Walford* and his heirs, the life-estate of him the said *William Richard Wykham*, expectant on the decease of the said *P. Lord Wenman*, and the estate or uses by the will of the said *Philip Lord Wenman*, deceased, devised to the son or sons of the then present *P. Lord Wenman* successively in tail male, of and in all the manors and hereditaments of or to which the said *W. R. Wykham* was seised or entitled for an estate tail under or by virtue of the said will, in trust for *William Richard Wykham* and his assigns during his life, to prevent any wife of the said *W. R. Wykham* from being entitled to dower out of the same premises. *W. R. Wykham*, on the death of the late *Lord Wenman*, was let into possession of all the testator's real estates and hereditaments not sold by the trustees under the will, and enjoyed the same until his death; and by indentures of lease and release of the 20th and 21st days of *June* 1800, the release made between *William Walford* of the first part, *W. R. Wykham* of the second part, *William Meyrick* of the third part, *William Broderip* of the fourth part, and *Richard Chapman* of the fifth part,

1810.

WYKHAM  
v.  
WYKHAM.  
[ \*321 ]

[ 322 ]

1810.  
 WYKHAM  
 v.  
 WYKHAM.

part, all the manors and hereditaments of him the said *W. R. Wykham*, which came or descended to him under or by virtue of the will of his grandfather, *P. Lord Wenman*, in the counties of *Oxford, Bucks, and Kent*, were granted and conveyed by *William Walford* and *W. R. Wykham* unto *W. Meyrick*, his heirs and assigns, to make him tenant to the precipe, in order that common recoveries might be had and suffered thereof. Recoveries were in, or as of *Trinity term 1800*, suffered of the same premises, in which *W. Broderip* was demandant, *W. Meyrick* tenant, and *W. R. Wykham* was vouchee. *Eleanor Lady Wenman* was living when the indentures of the 20th and 21st days of *June 1800* were executed, and the recoveries suffered. *W. R. Wykham* died after the suffering such recoveries, viz. on the 1st of *July 1800*, leaving the defendant, *Sophia Elizabeth Wykham*, his only daughter and heiress at law; and she is now the heiress at law of *Philip Lord Wenman* the testator. The mortgages are still unsatisfied and outstanding, and all *LORD WENMAN* the testator's debts are not yet paid. The complainant filed his bill against the defendants in the Court of Chancery, insisting that the estate in tail male limited by the will of the testator *P. Lord Wenman* to the first and other sons of the body of his daughter *Sophia*, was not barred by the said recovery, and praying that he might be declared entitled to an estate tail under that will in all the estates thereby devised, and that possession thereof might be delivered to him accordingly, and praying an account of the rents and profits thereof, accrued since the decease of *W. R. Wykham*, and that the *Earl of Abingdon* and *Sir William Henry Ashurst*, who were the surviving trustees in the aforesaid jointure deeds, might, without prejudice to the jointure of *Lady Wenman*, (who was then living, but is since dead,) or any other charges or incumbrances affecting the said estates, be directed to convey and assure the same to the plaintiff, or as he should direct; and that in such manner, that he might be enabled to suffer a good and perfect recovery thereof. Upon the hearing for further directions on the 10th of *May 1810*, the Lord Chancellor directed this case to be stated; and the question therefore for the opinion of this Court was, whether the trustees named in the deeds of appointment of the 20th *June 1766*, 26th *December 1782*, and the 1st of *December 1796*, or any of them, took any and what estate and interest in the manors, lands, and hereditaments in question, of which the Right Honourable *Philip Lord Wenman*, the testator, was seised

[ 323 ]

seised in fee simple at the time of making his will, and which were thereby given to the Honourable *Philip Wenman* his son (afterwards *Philip Lord Wenman*) for life, or any of them.

*S. Shepherd* for the plaintiff, *P. T. Wykham*;

*J. Lens* for the defendants.

1810.

WYKHAM  
v.  
WYKHAM.

*S. Shepherd*, Serjt. for the plaintiff. The effect of these settlements, coupled with the power, if indeed they had any legal effect at all, must be, that the trustees took either an estate in fee, or an estate *pur autre vie*, for the life of *Lady Wenman*, or a chattel interest. The true construction is, that they took an estate *pur autre vie*. The important inquiry is, what was the effect of the first settlement; for if any estate passed thereby, the subsequent deeds, the limitations of which are merely co-extensive with those of the first, could pass no further legal estate in the premises, inasmuch as the legal estate would already be vested in the trustees of the first settlement. If indeed there had been any difference in the deeds, so that they created different uses and consequences, there might be some ground to argue that some estate passed to the trustees by the last deeds: but here none could pass, whether a fee or an estate *pur autre vie* were created by the first deed, not, if a fee, because the whole legal estate would be exhausted by the first settlement, not, if an estate for life, because at the moment when the estate *pur autre vie*, created by the first deed, ceased by the death of *Lady Wenman*, the like estates granted by the second and third deeds would also be passed and gone. Perhaps the first deed, considered as a conveyance, would not pass any estate: but in the execution of a power, the appointee does not take his estate under the deed which executes, but under the deed which creates the power; it is the same thing as if the uses of the appointment were to be engrafted into *Lord Wenman's* will. It is clear that the successive devisees take legal estates under the devise. If both the sons had succeeded to the estates, and married, they might successively have executed this jointuring power, and each of them would thereby interpose a new legal estate before the estates of the subsequent remainder-men. The effect would be the same, as if the testator had devised to his eldest son for life, remainder to these trustees and their heirs during the life of *Lady Eleanor Bertie*, in trust to raise and pay to her 500*l.* *per annum* for her jointure during her life only, remainder to the first and other sons of the body of *Philip Lord Wenman* in tail. This would have created a mere

[ 324 ]

rent-

1810.  
 ———  
 WYKHAM  
 v.  
 WYKHAM.  
 [ \*325 ]

rent-charge during Lady *Wenman's* life, but it would have sufficed for all useful purposes. The testator could not have interposed here a fee-simple to the trustees of the jointure, without defeating all the subsequent limitations of \* his will, and turning them all to mere equitable estates; so to construe the appointment, therefore, would be putting a construction upon the will, directly contrary to the intentions of the testator, whose purpose evidently it was to give a legal estate to all the devisees for their several lives, and to their children in tail; and this intent must be upheld and effectuated, except so far as it is absolutely necessary to displace the estates devised, in order to give place to the new uses engrafted by the execution of the power. The word "heirs" being added after the names of the trustees, does not the more make this a fee-simple in them: for if the word "heirs" were wanting, the Court would supply it, that the estate might not be an estate for the joint lives of the trustees and the jointress, whereby the purpose of the settlement would be defeated, if they should die during her life. The Court would so construe an appointment, as best to effectuate the purpose of the appointor. In the case of *Venables v. Morris*, 7 T. R. 342., the Court held that the trustees there took a fee, because that best effectuated the intention of the settlor; but there are several cases where a fee-simple, primarily given, has been reduced to a less estate by the subsequent provisions of the deed, that construction being necessary in order to effectuate the intentions of the parties. In order to establish this as a fee, the defendant will be forced to contend that when words are once used, as here, conveying a fee, no subsequent language of the same deed can cut it down to an estate *pur auter vie*. But if he cannot successfully contend this, the fee in the present case is clearly reduced to an estate *pur auter vie*, by that which follows. The trust is, to pay the rent-charge to Lady *Wenman* during her natural life only. To effectuate this trust, no greater estate than an estate for her life is requisite. An estate *pur auter vie* is most strictly and technically expressed by an appointment to *A.* and his heirs during the life of *B.* If it were merely to *A.* during the life of *B.*, that would be an estate for their joint lives only. By construing this to be an estate in fee, all the subsequent limitations of the will are not merely postponed, they are absolutely altered and destroyed; for they are all thereby turned to equitable estates: but if it is construed to be an estate *pur auter vie*, then they are merely postponed during

[ 326 ]

ing the life of the jointress, and will successively take effect as legal estates, when the jointure ceases. *Jones v. Lord Say & Sele*, 8 Vin. 262. S. C. 1 Cas. Eq. Abr. 383. 3 Bro. P. C. 458. "A devise to trustees and their heirs for ever, upon trust out of the rents to pay several legacies and annuities, and after reimbursing themselves their costs, she doth appoint her trustees to pay all the residue of the rents to the proper hands of her daughter *Cecil Fiennes*, for her life, and after her decease the trustees to stand and be seised of the premises to the use of the heirs of the body of *Cecil Fiennes*, severally and successively, and to the heirs of their respective bodies in tail male. Lord King, Chancellor, held that the use was executed in the trustees and their heirs, during the life of *Cecil Fiennes*, and that she had only a trust in the surplus of the rents and profits; but that by the subsequent limitation, the use was executed in the persons entitled to take by virtue thereof, chargeable with the payment of the annuities." The reason of this judgment evidently was, because a life-estate sufficed for the purposes of the trust. [*Mansfield*, C. J. In that case it was never suggested that an estate *pur auter vie* in the trustees would suffice for the purposes of the trust. It does not appear by the report in *Viner*, whether there were any solid legacies given by that will, or whether there were merely annuities: if they were annuities, the trustees must have taken an estate during the lives of the annuitants and the survivor of them, as well as during the life of *Cecil Fiennes*, in order to effectuate the trusts of the will.] It is not incumbent on the plaintiff to dispute that. [*Lawrence*, J. I well remember, that upon that case being cited (a), Lord Kenyon, C. J. said, it was a case by itself, and he seemed to think it would have been better to hold that the trustees took the fee, and that both the estates limited to the widow were equitable, and might have been united.] *Doe ex dem. Compere v. Hicks*, 7 T. R. 433. The question was, whether a devise to trustees and their heirs, to preserve contingent remainders, but nevertheless to permit and suffer the tenant for life to receive the rents and profits during his life, with remainder to his first and other sons in tail male, conferred on the trustees the fee, or an estate *pur auter vie*. Upon failure of the issue of the tenant for life, there was a remainder to another tenant for life, fol-

1810.

WYKHAM  
v.  
WYKHAM.

[ 327 ]

(a) Probably in the case of *Harton v. Harton*, 7 T. Rep. 624. And see *Doe d. Leicester v. Biggs*, ante, vol. 2. p. 110.



1810.  
 WYKHAM  
 v.  
 WYEHAM.

[ 328 ]

lowed by the like limitation; and these circumstances justified the Court in saying, that the testator meant to devise to the trustees an estate *pur autre vie* only; for if the first devise to preserve contingent remainders, gave them the fee-simple, the second could give them no legal estate, so that such a construction would be inconsistent with the subsequent limitations. In like manner the devisor's general intent in the present case, requires that the trustees should take an estate for life only; for he gives the same powers to all the subsequent remainder-men to create the like estate as the first, which would be inconsistent with the first execution of the power, if the first had created an estate in fee. It may, however, be the case, that the words purporting to grant an estate in fee are an excessive execution of the power, and it will be argued that therefore the appointment shall be bad *in toto*. But that will not follow, even if that part of it should be bad for excess: for appointments are matters *sui generis*, and not to be construed by the rules as other conveyances. Perhaps this instrument, which is not a lease and release, confers no legal estate. But the covenant for quiet enjoyment, even if it stood alone, would operate as a good appointment: if it were, "I appoint *A.* and *B.* trustees, and I covenant that they may enter and quietly enjoy during the life of Lady *Wenman*;" that would be a good appointment of an estate for her life. [Heath, J. A covenant to stand seised to uses has been held to operate as a good appointment.] Yes, *King v. Melling*, 1 Vent. 228. There was a power to make a jointure: the devisee covenanted to stand seised to the use of himself for life, and after his decease to the use of his wife. It was a question what estate the devisee took by the devise, whether an estate for life, or in tail, and he suffered a recovery previous to entering into this covenant. *Rainsford, J.* thought he took an estate tail by the devise, and had since acquired the fee, and that as he had both an interest and a power, the use should arise out of his interest, and not be executed by virtue of his power, according to *Cleer's case*, 6 Co. 18. But *Hale, C. J.* held that he took an estate tail, and that though the jointure were here by covenant to stand seised, (an improper way to execute his power,) yet it might be construed an execution of it. Michs. 51. in that court, *Stapleton's case*, where a devise was to *A.* for life, remainder to *B.* for life, remainder to *C.* in fee, with power to *B.* to make his wife a jointure. *B.* covenanted to stand seised for the jointure of his wife, reciting his

his power. Though this could not make a legal jointure, yet it was resolved to inure by virtue of his power. *Quando non valet quod ago, ut ago, valeat, quantum valere potest.* But in the principal case, *Hale*, C. J. held, that *Bernard* had got a new fee, which though it were defeasible by him in the remainder, yet the covenant to stand seised should enure thereon, and the use should arise out of the fee." Therefore, as in *Stapleton's* case a covenant to stand seised was a good execution of the jointuring power, so here, if the grant to the trustees and their heirs be an excessive execution, the covenant for quiet enjoyment during the life of Lady *Wenman*, will operate as a good appointment. That covenant indeed gives the trustees no action on account of any interruption that may take place after the decease of Lady *Wenman*, but during her life the settlor covenants, not for his own acts merely, but for the acts of all claiming under the testator. This indicates the intention of granting a life-estate only; for this covenant extends to the acts of all the remainder-men in tail, against whom, if he meant to give a life-estate, he may safely covenant, for while the jointure is serving out of a life-estate, they have neither of them any right to enter; but if he had created a fee, he would have been covenanting for their perpetual forbearance, during an estate, which he had no right to create. *Curtis v. Price*, 12 Ves. 89. Lands were conveyed to trustees and their heirs, to the use of the husband *sans* waste, for life, and from his decease to the use of the wife for life, if she continued sole, and if she should marry, to the use of the trustees and their heirs, upon trust out of the rents, to pay her 50*l.* yearly during her life, and with the residue of the rents to maintain the children of the marriage, and after the decease of the husband and wife, to the use of the same trustees and their executors for one hundred years, (which was a trust for raising 500*l.* for younger children's portions,) with remainder to the use of the heirs of the body of the wife by her said husband, and for want of such issue, to the right heirs of the husband for ever. *Grant, M. R.* held, that the Court was authorized to read the settlement, as if the words "during the life of the wife" had been inserted. He said "the case of *Doe d. Compere v. Hicks* was very much in point, and in the case before him there was, first, what existed in that case, a purpose to be answered, for which an estate in the trustees during the wife's life would be sufficient, and next, a limitation for a term of years, which could not arise consistently

1810.

WYKHAM  
v.  
WYKHAM.

[ 329 ]

[ 330 ]

1810.  
 ———  
 WYKHAM  
 v.  
 WYKHAM.

tently with the estate in fee in the same trustees. Therefore, not only was the case similar to that of *Doe v. Hicks* in the particular on which the Court proceeded, but was stronger, as the intention not only would not be answered, but would be contradicted, unless the plaintiff's construction were put on the general words of the limitation to the trustees." His Honour's judgment did not happen to depend ultimately on this point. It will perhaps be contended that in the present case there is neither a fee nor an estate for life given, but some kind of chattel interest; but that is here impossible, because the trustees are empowered to enter during the life of the jointress only, and there is no case in which the Courts have held, that an estate given to trustees is a chattel interest, where the measure of the duration, is, as here, the duration of human life. In some cases, a fee may be limited down to a chattel interest: a tenancy by elegit, a devise to trustees to raise a sum of money, are chattel interests, although their duration is uncertain. Whether this rent-charge might have been conveniently secured by the creation of a chattel interest, and whether the Court of Chancery, if the matter had been submitted to their direction, would have ordered that mode to be pursued, it does not profit to inquire, but the estate granted is not to be changed by construction from a freehold to a chattel interest, even if the latter mode would have been rather the more convenient. If it be urged that it is a chattel interest, because the jointure may be in arrear at the time of Lady *Wenman's* decease, and that if it were an estate *pur auter vie*, the trustees could never after enter to levy them, Lord *Ellenborough*, C. J. suggests the proper answer, in the case of *Doe d. White v. Simpson*, 5 East 162., that the Court may presume a chattel interest to arise on the decease of the jointress, sufficient in duration to secure the payment of the arrears; though perhaps even that is unnecessary, for if the widow were to die in the middle of a quarter of a year, her executors would, under the statute 11 G. 2. c. 19. s. 15, be enabled to recover the rent-charge for the fractional part of the quarter elapsed since the last day of payment; and an argument which goes to more than that fractional part, goes on the supposition that the trustees have been guilty of laches in not enforcing the payments quarterly as they accrued due, which laches the defendant is not entitled to assume as the ground of his argument. [*Mansfield*, C. J. Had it ever been determined that the executor of a tenant *pur auter vie* is entitled to recover

recover a portion of the rent from the last quarter-day under that statute? He is certainly within the mischief, for otherwise the tenant of the land may keep the rent for his own benefit.]

*Lens*, Serjt. *contra*. It may be doubtful whether this instrument conveyed any estate at all to the trustees: and whether it were not void, not merely for the excess of execution in attempting to convey a fee, but therefore void *in toto*: but if it conveyed any estate, it either conveyed a fee, or else merely a chattel interest. In either of these three cases the defendant must succeed. The hypothesis of an estate *pur auter vie* involves all the difficulties attendant upon the defendant's argument, and some others peculiar to itself. The question is not, whether the creation of a freehold estate less than a fee might have sufficed, but whether the grant of a fee be not a good execution of the power. The objection raised to a fee, is, that it would counteract all the testator's intention by making all the subsequent estates equitable. But though it might be to a certain degree inconvenient to change a legal to an equitable estate, yet the real and substantial part will not be at all affected by it: and if it be good, the recovery will prevail, and all the same consequences follow. If the Court can look to the intention of the parties, it will look to the consequences, as tokens to be called in aid, in developing those intentions. If there be equal difficulties attendant on both constructions, the Court will rather make such an election between them, as not to deprive these persons of the right of suffering a recovery without asking the concurrence of parties, who in truth have nothing to do with the estates. This estate was much incumbered with mortgages, some for terms of years, a very small part of them, in fee. If a doubt arises, whether the estate of the trustees is for the life of the jointress only, let it be considered whether the property was in such a condition, that the trustees could, at the creation of their estate *pur auter vie*, and at all times of her life, enter on the land, and receive her jointure. They are to receive it quarterly. But on large estates, it is not the practice to reserve rents quarterly. Taking it, that the rents are reserved annually, or even half-yearly, that they are payable at *Lady-day*, and that after *Lady-day*, and before *Midsummer*, and before the rents are received, the jointress dies. On the statute 11 G. 2. c. 19. s. 15., her executors could only recover at most the fractional sum which has accrued since the quarter-

1810.

WYKHAM  
v.  
WYKHAM.

[ 332 ]

1810.

WYKHAM  
v.  
WYKHAM.

[ 333 ]

day, but the prior arrears could never by any process whatever be recovered. These would not, perhaps, be reasons sufficient to induce the Court to change an estate clearly expressed; but the deed clearly and manifestly, *primâ facie*, creates a fee, and the only question is, whether it is by implication to be reduced to an estate *pur auter vie*. Unless therefore this implication be made quite manifest, and unless the construing it to be a fee, will be attended with much worse effects than the other alternative, the Court will not resort for a solution to the estate *pur auter vie*. There is this further difficulty in the construction contended for; here is also a power of charging for younger children, and if the trustees are to have no other estate than during the life of the jointress, how are they, under that estate, to raise the portions for daughters, and to lease for twenty-one years absolute? [*Mansfield*, C. J. and *Lawrence*, J. The powers of charging and leasing are not given to the trustees: they are neither empowered to lease nor to charge; but the tenant for life is to exercise those powers *ad libitum*. It is argued on the other side, that this could not be a fee in the trustees, because during the estate of the trustees the tenant for life cannot grant a legal lease for twenty-one years, or make a legal charge.] That is only shifting the difficulties; and perhaps if all these difficulties had been suggested to the testator, he would have framed the limitations otherwise, and would have more fully considered the particular way in which the power should be executed. It is of no detriment to the defendant, though this should be held a void appointment; and indeed the testator not having exactly pointed out how far the tenant for life shall go, there is no measure by which the Court can discern the excess, and therefore the appointment is bad *in toto*. It even deserves to be considered whether this may not be a chattel interest. The argument against it, that the duration of no chattel interest can be measured by the life of man, is a *petitio principii*, for it assumes that, which the defendant does not admit, that this estate determines with the life of the jointress; though no case indeed has been cited, to prove that chattel interest may not be given determinable with human life.

[ 334 ] As to the cases cited, in that of *Doe d. Compere v. Hicks*, was evident that a fee was not intended to be given, because the same form of devise to trustees was repeated after the limitation of each estate for life; but in the present case there is no so palpable and necessary intendment by which the estate must

narrowed. *Venables v. Morris* may be considered as an authority that the Court will, if possible, construe such an estate to pass, as best will execute the intention of him who makes it. In *Curtis v. Price*, it was manifestly not the intention of the settlor to give the trustees a fee, because a term in the same premises is immediately after limited to them, to commence from the determination of the estate supposed to be a fee: that case therefore is not applicable here. The defendant does not much rely upon the case of *Doe d. White v. Simpson*, because the Court looked at it with a very different view, but it does seem that the Court would there have admitted that, which the plaintiff argues is impossible, the creation of a term for raising the arrears after the determination of the life estate. [*Mansfield*, C. J. If you admit that, you admit that the Court would rightly hold this to be an estate *pur auter vie*; because you remove the objection raised from the difficulty of levying the arrears after the life estate; and it would not necessarily follow that the original estate might not be an estate *pur auter vie*, although we were to hold that, after its determination, a new term would arise to complete the purposes of the limitation.] A devise of lands to trustees and their survivor, and the executors of the survivor, which has often been held to create a fee, was yet, in *Doe d. Simpson v. White*, held not to have that effect. [*Lawrence*, J. The further trust, to raise 800*l.*, it was held, might be sufficiently satisfied by implying a term after the lives of the annuitants; and therefore there was no need to construe it a fee.] It is therefore not unreasonable to imply a chattel interest in this case, since it appears to be the most obvious way of satisfying the intention of the parties, to create a chattel interest; and it may be properly so considered, although the words import a fee. It is, however, indifferent to the defendant to which of these two constructions the Court may incline. He says that the testator has given the tenants for life the power of displacing the succeeding legal estates, and converting them to equitable estates: but if this be considered as a void execution at law, it will displace no estates; and no injustice will be done by this construction, for the settlements will still operate as good charges in equity. A covenant to stand seised is a known form of conveyance, and may operate as an appointment, but it does not therefore follow that a covenant for quiet enjoyment should have the same effect. [*Mansfield*, C. J. The difficulty

1810.

WYKHAM  
v.  
WYKHAM.

[ 335 ]

1810.  
 ———  
 WYKHAM  
 v.  
 WYKHAM.

in *King v. Melling* was, that the covenant to stand seised was by a man who could not stand seised, because he was a tenant for life, whose estate expired with his own life, nevertheless it was held a good execution.] The covenant for quiet enjoyment is only in superabundance and in furtherance of his execution, but it did not go the whole length of the object; it could operate only for that which he covenanted for, the duration of his own estate. None of these expedients contended for by the plaintiff would, therefore, have secured to the jointress the regular quarterly payment of the rent-charge, the estate *pur auter vie* would be attended with great inconvenience, and it would be better to hold that the trustees took no estate at all than that.

[ 336 ]

*Shepherd*, in reply. The defendant seems to rely but feebly on the argument for a chattel interest. A lease or grant to any one generally, without saying more, is a lease for life: it may be reduced to a chattel by adding any thing which limits it to an event that must necessarily happen in a definite time. In *Doe v. Simpson*, Lord *Ellenborough* by no means held, that the estate, the trusts of which were to endure for the measure of human existence, was a chattel interest: on the contrary, he held that it was, as far as related to the annuitants, an estate *pur auter vie*; but to meet the objection that such an estate would not wholly satisfy the trusts of the will, because there was a solid sum to be raised, he held, that it might, as to that purpose, be considered, as if there had been no annuities at all, in which case it was clearly to be held a chattel interest for the raising of the solid sum: but the Court were quite clear it was not a fee for the purpose of raising the annuities for the annuitants. This execution is not void *in toto*: deeds which are completely bad as conveyances, will nevertheless operate well as appointments. Such was the case cited of the covenant to stand seised to uses. It is said that the settlor had the power to make a jointure given to him generally, and that by giving a fee he has executed it in the best possible way, but it may be denied that when a power is given to perform an act generally, and it may be done in either one of three or four methods, the appointor is at liberty to do it only in the best possible way; but if the best possible way were to be pursued, it could be executed only by giving an estate *pur auter vie*; because by that mode it may be effectuated without destroying any one of the legal remainders. In *Doe v. Simpson*,

Lord *Ellenborough*, C. J. says, (for much stress has been laid on the argument *ab inconvenienti*,) "if the inconvenience should subsist to a greater degree than it is likely to do, it would not warrant us in putting a construction on the will, in order to avoid it, which the terms of the will do not fairly and naturally in themselves bear." In the case of *Kenrick v. Lord William Beauchamp*, 3 Bos. & Pull. 175., Lord *Alvanley*, C. J. says, "It would indeed be much more convenient, that the legal estate should be vested in trustees for the payment of the debts, than that the trust should be executed by the devisees under the direction of a court of equity; for a court of equity could not enable a devisee to make a complete title to this estate. But this is only an argument *ab inconvenienti*, from which we cannot construe the testator to have said that which in fact he has not said." The observation that the testator seems to have contemplated that these estates were covered with incumbrances, and that trustees could not instantaneously get into the pernancy of the rents and profits, wherefore an estate *pur autre vie* would be unsuitable to the purpose of securing the annuity, goes to the length of supposing that nothing might arise during the whole life of the jointress, and that a sale might be necessary, in order to secure payment to her executors of the whole sum which accrued during her life; but this argument is rebutted by the circumstance that the testator has devised specific estates for the payment of his debts, and has devised over the residue, and that he directs the jointure to be raised out of the rents and profits only, so that he evidently contemplated, that the estate which he subjected to the jointuring power, would be unincumbered and sufficient. It is argued that the testator, in creating an estate tail, intended that the tenant in tail should be in a condition to cut off the entail as soon as possible: but this, surely, is not to be presumed, but rather the contrary: and though the Court will do nothing to prolong an entail, they will lend no extraordinary assistance in order to cut it off. No case has been cited to shew that an estate given to trustees and their heirs, coupled with duties, that consist with a less estate, shall carry a fee. A devise to trustees and their heirs in trust to sell, was held by Lord *Hardwicke* to confer a fee, because a less estate would not answer the purpose, but here no such necessity exists; and although, if the settlement were now to be made, the Court of Chancery would direct it to be framed in the best possible way, yet when the appointment is actually made, and is legally good, the Court will not undo it, merely

1810.

—  
WYKHAM  
v.  
WYKHAM.

[ 337 ]

[ 338 ]



1810. merely because a better mode might possibly have been suggested.

WYKHAM.

v.

WYKHAM..

*Cur. adv. vult.*

On this day the Court sent to the Lord Chancellor the following certificate:

WE have considered the circumstances of this case, and the arguments of counsel for the parties, and are of opinion that the trustees named in the deed of appointment of the 20th day of *June* 1766, and in the other deeds of the 26th of *December* 1782, and the 1st of *December* 1796, did not, nor did any of them, take any estate or interest in the manors, lands, and hereditaments in question, of which the Right Honourable *Philip* Lord *Wenman*, the testator, was seised in fee-simple at the time of making his will, and which were thereby given to the Honourable *Philip Wenman* his son, afterwards *Philip* Lord *Wenman*, for life, or in any of them.

J. MANSFIELD.

J. HEATH.

S. LAWRENCE.

A. CHAMBRE.

[ 339 ]

WHITE and Others v. HOWARD.

Nov. 28.

If the defendant plead a subtle plea to ensnare the plaintiff, the Court will permit the plaintiff to sign judgment, unless the defendant will amend.

THIS was an action upon a bail-bond. The defendant pleaded, that the plaintiffs sued out the writ upon which they had declared against him, before the assignment of the supposed writing obligatory was stamped according to the directions of the statute; and also before any cause of action in that suit had accrued to the plaintiffs thereupon; which he averred, and prayed judgment, and that the plaintiffs might be directed to cause the writ to be returned and filed of record, and that the record thereof, when returned, might be inspected by the Court.

*Peckwell*, Serjt. had on a former day obtained a rule *nisi* to quash this plea, and that the plaintiffs might be at liberty to enter up final judgment, as for want of a plea.

*Onslow*, Serjt. shewed cause. Although there may be some surplusage, the plea is good. The statute 4 & 5 *Ann. c. 16.* requires that the assignment of the bail-bond shall be stamped before any action is brought thereon. This part then of the plea

i:

is of itself a good and substantive ground of defence, and the defendant might have stopped here: but he goes on to say, "and before any cause of action in that suit had accrued to the plaintiffs," which is another good defence: he then proceeds to pray that the plaintiff may be directed to bring the writ into Court; it is known the Court will not compel the production of the original writ, but this surplusage at the end will not vitiate the foregoing part of the plea, which is good. It suggests a plain replication, that the assignment was stamped before the writ sued out; and the plaintiff might have proceeded to an issue upon that fact.

*Peckwell* in support of his rule. The gentleman who penned this plea has laid a very ingenious trap. He knew the Court would not grant oyer of the original writ, and if we had demurred to the plea for want of oyer, he would have said, there is a prayer of oyer at the end of the plea. The plea that the assignment was not stamped in due time, is a valid one, and well known, but the ordinary and proper form is, to plead that it was not stamped at the *commencement of the suit*: if he had so pleaded, the plaintiffs could have taken issue on it with safety, but the defendant refers to the time of suing out the writ on which the plaintiffs declare. If the plaintiffs had replied that the assignment was stamped before the commencement of the suit, the defendant would have demurred for the departure; if the replication had been, that the assignment was stamped before the original writ was sued out, it could not have been shewn until oyer of the original, which is never granted; if the plaintiffs had replied that it was stamped before the *capias* was sued out, the defendant would have said that that was merely mesne process, and that it was an admission that it was not stamped before the original sued out. The writ on which the plaintiffs declare, is not the writ which they sue out; they sue out a *capias ad respondendum* only, but declare upon an original. In all these cases of new devices and experiments, the Court permits judgment to be signed for want of a plea.

The Court thought there might be some ambiguity in the words "sued out the writ on which they have declared," but discharged the rule, upon condition of the defendant amending *instantèr*, by altering it to the words "commenced this suit," and striking out the prayer of oyer.

Rule discharged without costs.

1810:

WHITE  
and Others  
v.  
HOWARD.

[ 340 ]

[ 341 ]

1810.

## REGULA GENERALIS.

IT is ordered, that from henceforth inailable cases for any sum exceeding one thousand pounds, it shall be sufficient for the bail to justify in one thousand pounds beyond the sum sworn to.

END OF MICHAELMAS TERM.

CASE

1811.

## BOUGHTON v. SANDILANDS.

**T**HIS was a case directed by the Lord Chancellor for the opinion of the Court of Common Pleas. The case stated, that on the 26th of *January* 1794, Sir *Edward Boughton*, being seised in fee of an estate called *White Acre*, by his will devised the same to *Richard Sandilands* and *John Allen*, their heirs and assigns, "In trust and to and for the uses after mentioned, (that is to say,) to the use of his daughter *Eliza Davis*, during her natural life; and after her decease, to the heirs of her body lawfully to be begotten, in tail general; provided that his said daughter should marry with the consent of her guardians, and that the husband she might happen to marry should take upon him the name of *Boughton*; and in case *Eliza Davis* should die without issue, then, in trust for his daughters *Caroline Davis* and *Lucy Davis*, successively, for life, and to the issue of their respective bodies lawfully to be begotten, successively in tail general. And after the decease of all his daughters without issue, in trust for the testator's own right heirs for ever." And in the will were contained the following words: "I appoint my sister *Rutherford* and Mr. *Sandilands* guardians of my said children." The testator died without legitimate issue; *Eliza*, *Caroline*, and *Lucy Davis*, named in the will, had gone by the name of *Boughton* in the testator's lifetime. They were reputed and believed to be the natural children of the testator. At the time of the birth of *Eliza*, her mother was lawfully married to a person of the name of *Kaye*, who was living at the death of the testator; and on the 10th of *August* 1798, on which day *Eliza* was married by licence to *George Charles Brathwaite Esq.*, Mrs. *Rutherford* and Mr. *Sandilands*, who were named as guardians in the will, having been first appointed guardians by the Court of Chancery, and having been parties assenting to the marriage. Previous to this marriage, articles, bearing date the 6th *August* 1798, were entered into by which Mr. *Brathwaite* covenanted, that upon the said *Eliza Davis* coming of age, the said estate should be conveyed to certain uses in the articles specified, and that he and his intended wife should join in recoveries for conveying the same to such uses; these are entered into in consideration of the intended marriage, and of the settlement or provision to be made by the intended husband

A lady having actually married with the consent of guardians named by her deceased supposed putative father, and confirmed by the Court of Chancery, she suffered a recovery, and declared the uses to the joint appointment of herself and her husband, with remainder in strict settlement. It being discovered that her supposed marriage was void, because at the time thereof her legal father was alive, and did not consent to the marriage, the parties conceived that the settlement and recovery were void, and executed a deed of revocation, and suffered another recovery, after which the lady made a new settlement. Held that the recovery and first settlement were valid, although made under a mistake of the situation in which the parties stood.

[ 343 ]

1811.  
 BOUGHTON  
 v.  
 SANDILANDS.

husband for the wife and her issue. *Eliza* attained her age of 21 years on the 21st of *March* 1799. An indenture of bargain and sale, bearing date the 1st day of *May* 1799, was made and executed between *G. C. Brathwaite*, by the description of *G. C. Brathwaite Boughton*, of *Poston*, in the county of *Hereford*, Esq., a lieutenant-colonel in His Majesty's army (therefore called *G. C. Brathwaite*), and *Eliza Davis*, by the description of *Eliza his wife* (one of the daughters and a devisee, named in the last will and testament of *Sir Edward Boughton*, late of *Poston Court*, in the county of *Hereford* aforesaid, Baronet, deceased, of the first part; *James Farrer*, Esq. of the second part; and *Thomas Atkinson*, Gentleman, of the third part: It recited the testator *Sir E. Boughton's* will, his death without revoking or altering it, the marriage with such consent as aforesaid; that *G. C. Brathwaite* had, by virtue of His Majesty's royal licence, assumed and used the name of *Boughton*; that *Eliza*, the wife, had attained the age of 21; that he and she, or he in her right, were in possession; that he and his wife had agreed and determined to suffer a common recovery, to the uses therein after limited; and therefore in pursuance of that agreement, and for barring her estate tail, and for assuring the premises to the uses thereafter declared, and in consideration of ten shillings to each of them paid by the said *James Farrer*, they grant, bargain, and sell to him and his heirs the premises, to hold unto, and to the proper use and behoof of him, his heirs and assigns, during the joint natural lives of the husband and wife, to the intent to make him a good tenant to the precipe, that a recovery might be suffered, in which a writ of entry might be sued out against *Farrer*, who was to appear and vouch to warranty *G. C. Brathwaite Boughton* and *Eliza* his wife, who were to vouch over the common vouchee, &c.; and the recovery was to enure to the use of such person or persons, and for such estate or estates, and to, for, and upon such uses, trusts, intents, and purposes, and under and subject to such charges, powers, provisions, and declarations as the said *G. C. Brathwaite Boughton* and *Eliza* his wife, by any deed or deeds, &c. should jointly direct, limit, or appoint; and in default of and subject to any such joint direction, limitation, or appointment, to the use of *G. C. Brathwaite Boughton* and his assigns for life, sans waste; with remainder to the use of *Eliza* his wife, and her assigns for life, sans waste; with remainder to the use of *Farrer* and his heirs, during the lives of *G. C. Brathwaite Boughton* and *Eliza* his wife, and the life of the

[ 344 ]

the survivor of them, upon trust to preserve the contingent remainders; with remainder to the use of the first and other sons of *Eliza Boughton*, by *G. C. Brathwaite Boughton* her husband, successively in tail male; with remainder to the use of the first and other daughters of *Eliza Boughton*, by *G. C. Brathwaite Boughton* her husband, successively in tail male; with remainder to the use of the first and other sons of *Eliza Boughton*, by *G. C. Brathwaite Boughton* her husband, successively in tail general; with remainder to the use of the first and other daughters of *Eliza Boughton*, by *G. C. Brathwaite Boughton* her husband, successively in tail general; with remainder to the use of the first and other sons of *Eliza Boughton*, by any husband or husbands with whom she might happen to intermarry after the decease of *G. C. Brathwaite Boughton*, successively in tail male; with remainder to the use of the first and other daughters of *Eliza Boughton*, by such after taken husband or husbands, successively in tail male; with remainder to the use of the first and other sons of *Eliza Boughton*, by any after-taken husband or husbands, successively in tail general; with remainder to the use of the first and other daughters of *Eliza Boughton*, by any such after-taken husband or husbands, successively in tail general; with remainder to the use of such person or persons, and for such estate or estates, and to, for, and upon such uses, trusts, intents, and purposes, and under and subject to such charges, powers, provisoes, and declarations, as *G. C. Brathwaite Boughton*, at any time or times during his life, by any deed or deeds, &c. should separately or alone direct, limit, or appoint; and in default of such last mentioned direction, limitation, or appointment, to the use of the right heirs of *G. C. Brathwaite Boughton* for ever. In Easter term 1799, a recovery was duly suffered pursuant to the said deed. This indenture in every part of it describes *G. C. Brathwaite Boughton* and *Eliza*, as husband and wife, but it is not expressed to be made in execution of the articles before marriage, nor in consideration of the marriage; and in fact, the uses are materially different from those to which the premises were covenanted by the articles to be settled; and it being taken for granted that the parties were married, there is no limitation of any use to her and her heirs until the marriage. After this indenture was executed, and the recovery suffered in pursuance thereof, it was discovered that when the articles of the 6th August 1798 were entered into, and when the marriage was supposed to be had, *Eliza* was, in law, the daughter of her mother and the man to whom her mother was married; and therefore that

1811.

BOUGHTON  
v.  
SANDILANDS.

[ 345 ]

[ 346 ]

1811. that *Eliza's* marriage with *G. C. Brathwaite Boughton* was not  
 ——— duly solemnized, and that they were not husband and wife; and  
 BOUGHTON upon the trial of an issue since directed by the Court of Chan-  
 v. cery, this has been so found. In these circumstances, by a deed  
 SANDILANDS. of four parts, dated the 27th of *June* 1800, and made between  
*Eliza Boughton* by the description of *Eliza Boughton* otherwise  
*Eliza Kaye*, otherwise *Eliza Davis*, of *Poston Court* in the county  
 of *Hereford*, spinster, and devisee in tail named in the last will  
 and testament of *Sir Edward Boughton*, of the first part, *G. C.*  
*Brathwaite Boughton* of the second part, *James Farrer* of the  
 third part, and *Thomas Atkinson* of the fourth part; reciting the  
 will of *Sir Edward Boughton*, and the articles of the 6th *August*  
 1798, the bargain and sale of the 1st *May* 1799, and the reco-  
 very suffered in pursuance thereof; and reciting that since the  
 said several indentures were executed, and the said recovery suf-  
 fered, it had been discovered that at the time of the date and ex-  
 ecution of the indenture of 6th of *August* 1798, and at the time  
 when the marriage between the said *G. C. Brathwaite Boughton*  
 and *Eliza Boughton* was supposed to be solemnized, *Eliza* was a  
 legitimate child of *John Kaye* by his wife *Salome Kaye*, (in the  
 testator's will called *Salome Davis*,) and that *John Kaye* and  
*Salome* his wife, (the lawful father and mother of *Eliza*) were  
 still both living, wherefore, inasmuch as *Eliza Boughton* was  
 an infant under the age of 21 years, and incapable of contract-  
 ing matrimony, or of making, or agreeing to make, any settle-  
 [ 347 ] ment or settlements of her estates or fortune when the before-  
 mentioned indenture of the 6th of *August* 1798 was made and  
 entered into; and when the marriage between *G. C. Brath-*  
*waite Boughton* and *Eliza Boughton* was agreed upon, and  
 was meant and intended to be solemnized, and inasmuch as the  
 same indenture of settlement was made and executed, and the  
 said marriage was contracted and attempted to be solemnized,  
 without the consent of *John Kaye*, the father and natural guar-  
 dian of *Eliza Boughton*, it was considered and understood that  
 the said supposed marriage between *G. C. Brathwaite Boughton*  
 and *Eliza Boughton*, and also the articles of the 6th of *August*  
 1798, and the settlement of the 1st *May* 1799, and all other  
 settlements and contracts or agreements for settlements whatso-  
 ever, made, entered into, or executed, in contemplation or con-  
 sideration of such marriage, were absolutely null and void; and  
 that *Eliza Boughton* and *G. C. Brathwaite Boughton* were then  
 at full liberty, either to marry again, or to remain single and  
 unmarried, as they might think proper; and that if *Eliza*  
*Boughton*

*Boughton* and *G. C. Brathwaite Boughton* should determine to marry again, then that they were competent and at full liberty, either before or after such new marriage, to enter into and make such other articles or settlements, of or concerning their estates or fortunes, or to refuse or omit making any such articles or settlements, as they might think proper; and reciting that *Eliza Boughton* and *G. C. Brathwaite Boughton* were agreed, and had determined, not to marry again upon the terms, or under any of the conditions or engagements for making settlements, which were agreed upon, or were stipulated for, or made, or entered into, on the treaty aforesaid, or in contemplation of their supposed former marriage; and that, in order that if *Eliza Boughton* and *G. C. Brathwaite Boughton* should thereafter determine to marry again, there might be no reason or pretence to contend, insist, or suppose, that such second marriage was agreed upon, or had, or solemnized upon any such terms or under any such conditions or agreements for making settlements as aforesaid, *G. C. Brathwaite Boughton* and *Eliza Boughton* had not only mutually and respectively agreed to rescind, revoke, and declare absolutely null and void, the said two indentures of settlement of the 6th August 1798 and the 1st May 1799, and all the covenants, contracts, agreements, uses, trusts, limitations, provisoes, and declarations therein respectively contained; but had also mutually and respectively agreed to release, exonerate, and discharge each other from all contracts, promises, engagements and agreements whatsoever, either for marriage or for making any settlement or settlements upon, or in consideration of marriage, which had at any time or times theretofore been made or entered into between and by *G. C. Brathwaite Boughton* and *Eliza Boughton*, or by one of them with or to the other of them, or by one of them with or to any other person or persons on behalf of the other of them; and of and from all breaches or forfeitures of such contracts, promises, engagements, and agreements respectively, and all actions, suits, damages, claims, and demands on account thereof, or of any of them, respectively, in such manner as was thereafter mentioned and expressed; and that *Eliza Boughton* had also agreed to release and discharge *G. C. Brathwaite Boughton* from, and to ratify and confirm all payments that had been made by or to, and all acts, matters, and things that had been done by *G. C. Brathwaite Boughton* from, for, or on account of, or upon, about, or concerning the estates devised by the said recited will, since the marriage so intended and attempted

1811.

BOUGHTON  
v.  
SANDILANDS,

[ 348 ]



1811. tempted to be had and solemnized between them ; and reciting, that for the purpose of avoiding or obviating and removing all doubts \* and questions that might arise respecting the operation of the said common recovery, or respecting the sufficiency of such common recovery, to bar, extinguish, and destroy the estate tail vested in *Eliza Boughton*, under or by virtue of the same will, with all remainders and reversions thereupon expectant or depending; and for the purpose of conveying the premises to such uses, upon such trusts, and for such intents and purposes as were thereafter limited, *Eliza Boughton* had determined to suffer a new common recovery of the premises in the manner thereafter mentioned; and that *Eliza Boughton* had requested *G. C. Brathwaite Boughton* to join with her in making a tenant to the precipe for such new common recovery, which he had agreed to do in such manner as thereafter was expressed; therefore, by the said deed, *G. C. Brathwaite Boughton* and *Eliza* did severally and respectively rescind, revoke, and declare absolutely null and void the said several indentures of the 6th August 1798 and the 1st of May 1799, respectively, and all the covenants, contracts, agreements, uses, &c. in or by the same indentures, or either of them, limited, declared, or contained; and also all other contracts, promises, engagements, and agreements whatsoever, either for a marriage, or making any settlement upon, or in consideration of marriage, which had at any time theretofore been made or entered into between them; and they and each of them did quit claim to the other of them, all contracts, promises, engagements, and agreements whatsoever, either for marriage, or for making any settlement or provision upon, or in consideration of marriage, which at any time theretofore had been entered into by them, with or to the other of them, or by either of them, with or to any person or persons whomsoever, on behalf of the other of them; and from all breaches or forfeitures that had been or should thereafter be made or committed of, in or concerning the said contracts, promises, engagements, and agreements, or any of them; and also of and from all actions, suits, &c. whatsoever, on account or in respect of such contracts, &c.; and for the barring the estate tail which by or under the testator's will was vested in *Eliza Boughton*, of and in the premises, and all remainders and reversions upon the same estate tail expectant or depending, (in case the same had not already been well and effectually barred by the said common recovery); and for conveying, limiting, and assuring

BOUGHTON

v.

SANDILANDS.

[ \*349 ]

[ 350 ]

assuring the premises to the uses, upon the trusts, and for the intents thereafter limited, declared, or expressed, and also in consideration of 10s. to each of them, *G. C. Brathwaite Boughton* and *Eliza Boughton*, paid by *Farrer*, the said *G. C. Brathwaite Boughton*, at the request and by the direction of *Eliza Boughton*, and according to such estate or interest as he had in the premises, (if any such he had,) and also the said *Eliza Boughton*, did each of them grant, bargain, and sell, direct, limit, appoint, and confirm unto *Farrer*, his heirs and assigns, the premises, and all their and each of their estate, to hold unto and to the use of *Farrer*, his heirs and assigns, for the life of *Eliza*, to the intent that a recovery might be suffered, in which the writ of entry was to be prosecuted against *Farrer*, who was to vouch *Eliza Boughton*, (not *G. C. Brathwaite Boughton*,) who was to vouch the common vouchee: and the uses were declared to be to such person or persons, and for such estate or interest, estates or interests, upon such trusts, and to or for such intents or purposes, and under and subject to such powers, provisoes, charges, conditions, and restrictions, and in such manner and form as *Eliza Boughton*, (notwithstanding any coverture she might be under, and whether she should be covert or sole,) at any time or times during her natural life, by any deed or writing either with or without power of revocation and new appointment, should direct, limit, appoint, give, or devise the premises; and in default thereof, to the use of *Farrer* and his heirs during the life of *Eliza Boughton*, in trust to permit her to hold and enjoy the same, and to receive and take the rents, issues, and profits thereof for her own use during her life, and to convey such estate or interest to such person or persons, and at such time or times, and in such manner, as *Eliza Boughton*, (notwithstanding any coverture, and whether she might be covert or sole,) should direct or appoint; and from and immediately after her decease, then to the use of the right heirs of *Eliza Boughton* for ever. In *Trinity* term 1800, a recovery was duly suffered, pursuant to the last deed, wherein *Eliza Boughton* was vouched, and not *G. C. Brathwaite Boughton*.

By indentures of lease and release, dated 2d and 3d April 1802, and made between *Eliza Boughton*, (by the same description as in the last deed), of the first part, *G. C. Brathwaite Boughton* of the second part, *James Farrer* of the third part, and *William Fulke Greville*, *Thomas Coutts*, and *Edmund Antrobus*, Esqrs. of the fourth part, reciting the deed of the 27th June

1811.

BOUGHTON  
v.  
SANDLANDS.

[ 351 ]

1811. 1800, and that a recovery, (as the fact was,) had been suffered according to it; and that a marriage had been agreed upon, and was intended to be shortly had and solemnized between *G. C. Brathwaite Boughton* and *Eliza Boughton*; and that upon the treaty for the marriage, and in consideration of the settlement or provision agreed to be made by *G. C. Brathwaite Boughton* upon and for *Eliza Boughton*, and the children or issue of the said marriage, (if any such there should be,) in such manner as mentioned in a certain indenture of three parts, bearing equal date therewith, it was stipulated and agreed, by and on the part of *Eliza Boughton*, that she should and would, previous to the solemnization of the then intended marriage, limit, appoint, settle, convey, and assure the premises to the several uses, &c. thereafter limited or expressed; and that *Farrer* had agreed to join with her in conveying the premises in such manner as thereafter expressed; therefore, in pursuance of that agreement, and in consideration of the said then intended marriage, and of the settlement or provision made or agreed to be made by *G. C. Brathwaite* upon or for *Eliza Boughton*, and the children or issue of the intended marriage, (if any such there should be,) as in the said indenture bearing equal date therewith was mentioned, she, the said *Eliza Boughton* (in exercise of the power given or reserved to her by the last-recited indenture, and with the privity and consent of *G. C. Brathwaite Boughton*,) directs, limits, and appoints, that the premises should go, remain, and be, and that the said indenture, and the recovery suffered in pursuance thereof, and all other assurances, should from thenceforth operate and enure to the uses, &c. thereafter limited. And for the considerations aforesaid, and for the better and more effectually conveying, settling, and assuring the premises to the uses, &c. thereafter mentioned, and in consideration of 10s. a-piece to *Eliza Boughton* and *James Farrer*, paid by *William Fulke Greville*, *Thomas Coutts*, and *Edmund Antrobus*, the said *James Farrer* (according to his estate and interest in the premises, and at the request and by the direction of *Eliza Boughton*, and with the privity and approbation of *G. C. Brathwaite Boughton*,) bargains, sells, aliens, and releases; and *Eliza Boughton*, with the like privity, consent, and approbation of *G. C. Brathwaite Boughton*, grants, bargains, sells, aliens, releases, and confirms unto *Greville*, *Coutts*, and *Antrobus*, (being in their possession,) and their heirs, the premises, to hold unto them, their heirs and assigns for ever, to the uses, &c. thereafter limited;

1811.

BOUGHTON

v.

SANDILANDS.

[ 352 ]

[ 353 ]

limited; (that is to say,) to the use of *Eliza Boughton* and her heirs, until the intended marriage; and from and after the solemnization thereof, then to the use of such person or persons, and for such estate or estates, and to, for, and upon such uses, &c. as *G. C. Brathwaite Boughton* and *Eliza Boughton* should by deed jointly appoint; and in default thereof, to the use of *G. C. Brathwaite Boughton* for life; remainder to the use of *Eliza Boughton* for life; remainder to the use of the said trustees and their heirs, during the lives of *G. C. Brathwaite Boughton* and *Eliza Boughton*, upon trust to support contingent remainders; remainder to the use of the first and other sons of *Eliza Boughton* by *G. C. Brathwaite Boughton*, successively in tail male; remainder to the use of the first and other daughters of *Eliza Boughton* by *G. C. Brathwaite Boughton*, successively in tail male; remainder to the use of the first and other sons of *Eliza Boughton* by *G. C. Brathwaite Boughton*, successively in tail general; remainder to the use of the first and other daughters of *Eliza Boughton* by *G. C. Brathwaite Boughton*, successively in tail general; remainder to the use of the first and other sons of *Eliza Boughton*, by any after-taken husband, successively in tail male; remainder to the use of the first and other daughters of *Eliza Boughton*, by any such after-taken husband, successively in tail male; remainder to the use of the first and other sons of *Eliza Boughton* by any after-taken husband, successively in tail general; remainder to the use of the first and other daughters of *Eliza Boughton*, by any after-taken husband, successively in tail general; remainder to the use of such person or persons, and for such estate or interest, estates or interests, and to and for such intents and purposes, and under and subject to such powers and provisoes, charges, conditions, and restrictions as *Eliza Boughton* (notwithstanding coverture) should by will, executed and attested as therein mentioned, limit, appoint, give, or devise the same premises; and in default thereof, to the use of the right heirs of *G. C. Brathwaite Boughton* for ever. *G. C. Brathwaite Boughton* does not convey by these deeds of the 2d and 3d of April 1802. A marriage was afterwards duly had and solemnized on the 24th of June 1802. There has since been born a daughter of the said marriage, named *Frederica Emma Laura*, who is now living, and no other issue. *G. C. Brathwaite Boughton*, conceiving that the deed of 1st May 1799, and the recovery thereupon suffered, were not void in law, has, in the form prescribed by that deed, limited and appointed to *A. B.*

Vol. III.

S

and

1811.

BOUGHTON  
v.  
SANDILANDS

[ 354 ]

1811.  
BOUGHTON  
v.  
SANDILANDS

and his heirs, the premises, upon the determination of the former estates, by that deed and recovery supposed to be created: and *Eliza Boughton*, conceiving that deed and recovery to be void in law, has, according to the form prescribed by the deed of the 3d of *April* 1802, limited (subject to the prior estates thereby supposed to be created) the premises to *C. D.* and his heirs.

The questions therefore referred for the opinion of the Court of Common Pleas, are:

1. Does *Frederica Emma Laura*, the daughter of the said marriage, take any and what estate in the premises by virtue of the deed and recovery of 1799? or is the proposition recited in the deed of the 27th of *June* 1800, true in the law, that the deed of 1st of *May* 1799, was absolutely null and void?

2. Does *Frederica Emma Laura*, the daughter of the said marriage, take any and what estate in the premises by virtue of the deed of the 27th of *June* 1800, the recovery suffered according thereto, and the deeds of 1802, or any, and which of them?

[ 355 ]

3. Is *A. B.*, the appointee of *G. C. Brathwaite Boughton*, entitled to any and what estate in the premises?

4. Is *C. D.*, the appointee of *Eliza Boughton*, entitled to any and what estate in the premises?

This case was thrice argued: the first time in *Easter* term 1809, by *Lens*, Serjt. for the plaintiffs, (who were said to be *Geo. C. Brathwaite Boughton*, now *Sir Geo. C. B. Boughton*, *Eliza*, now *Lady Boughton*, *Frederica Emma Laura*, her daughter,) and *C. D.*, her appointee, mentioned in the fourth query; and by *Best*, Serjt. for the defendants (a), who were said to be the trustees under the will of *Sir Edward Boughton*, and who had filed their bill, praying to have the deed of 1799 delivered up to be cancelled; the second time in *Trinity* term 1809, by *Shepherd*, Serjt. for the plaintiffs, and *Williams*, Serjt. for the defendants; and again, the third time, in *Hilary* term 1810, by *Lens* for the plaintiffs, and *Williams* for the defendants.

The first and second arguments were in substance as follow. For the plaintiffs. The principal question is, what was the effect of the deed of 1st *May* 1799, and the accompanying recovery, for the articles of the 6th of *August*, being purely

(a) Both the counsel for the defendants declared, in the course of each of their several arguments, that they did not know who the persons were in whose behalf they were to contend, nor what were their interests; and that they abstained from pressing some points, lest they should injure their clients' interests without knowing it.

equitable,

equitable, do not affect the legal estate. As to this deed and recovery, two propositions are asserted by the plaintiffs: first, that the deed and recovery, considered as one assurance, are both void together; secondly, that the deed is void even if the recovery stands good. If the deed be void, and the recovery good, then there being no declaration of the uses of the recovery, the uses shall result to *Lady Boughton*, the person suffering the recovery, in fee. 2 *Ro. Ab.* 789, *line 45. pl. 1.*, and again, *ibid.*, *line 50. pl. 2.* “If two join in a common recovery, where one, (as here the supposed husband,) hath nothing in the land, and no use is limited thereon, this shall be to the use of him solely who had the interest in the land, and no use shall arise to the stranger.” But if it be a necessary consequence that the deed of 1st *May* 1799 cannot be good for the purpose of making a tenant to the *precipe*, and bad for the further uses, and that the recovery and the deed must fall together, then the plaintiffs contend that the recovery is void also. For where the whole foundation of a deed fails, there the deed itself is void; and the recitals all shew that this deed is made upon the very foundation of a marriage previously had, which marriage did not in truth exist: therefore none of the terms contained in that deed can have any effect or legal operation. The deed recites that *Geo. Boughton* and *his wife* had agreed to suffer a common recovery: if she was not his wife, then there was no agreement; it was not agreed between him and *Eliza Boughton*, a feme sole; the parties are described as *husband* and *wife*, the uses are declared to be, to such person as he, and *Eliza Boughton his wife*, should appoint: if he was not her husband he had no such power; still less in that case was there any foundation for the uses to the supposed husband for life, remainder to *his wife Eliza* for life, and to her first and other sons, and first and other daughters, by *G. Boughton, her husband*, in tail. It is unnecessary to discuss whether the parties could, if they had pleased, have framed a settlement containing a provision for illegitimate children to be thereafter born of them; they never had it in contemplation to make any such provision, nor do the words of this settlement create any such; for the first and other sons and daughters, can, in law, designate only legitimate offspring. The uses in this deed depend upon an implied condition precedent in law, although it is not in form a condition: it is assumed that a legal marriage had taken place: if there were not that, it was not in the contemplation of the parties to make any change in her estate

1811.

BOUGHTON  
v.  
SANDILANDS.

[ 356 ]

[ 357 ]

1811. at all: the marriage therefore failing, the uses are void. 3 Co. Dig. 78 Condition B. 1. A condition precedent is such as ought to be performed before the estate vests, or the grant or gift takes effect. There was no intent in *Eliza Boughton* to transfer this estate, otherwise than on the supposition that the uses which she proposed were to take effect. Co. Litt. 201. a. *Littleton* subdivideth conditions in deed into conditions precedent, (of the which it is said, *conditio adimpleri debet priusquam sequatur effectus*,) and conditions subsequent. Litt. 378. Such conditions as is intended by the law to be annexed to any thing, is as strong as if the condition were put in writing. [*Mansfield*, C. J. Suppose, instead of the circumstances which have happened, the lady had, after making the deed, discovered that her husband had been previously married to another woman: would not that have avoided the deed?] No case is extant exactly similar, but in several cases where marriage has been the foundation of the deed, the foundation failing, the deed has had no effect. 2 Ro. Ab. 792., line 47. pl. 3. If A., being seised of land, in consideration of a marriage to be had between him and B., covenants to stand seised to the use of himself and B. for life, this is a contingent use, so that if the marriage do not take effect, the use shall not arise to B. Ibid. pl. 4. If A. being seised of land, in consideration of a marriage to be had between B., his son, and C., a woman, who are *infra annos nobiles*, covenants to stand seised to the use of B. and C., and then the marriage is had, and then they are divorced, the use limited to the wife shall cease. Dyer 13. a. pl. 61. A man gave certain goods with his daughter in marriage, and afterwards they were divorced: the question was, whether the woman should have her goods back again by *Fitzherbert* and *Bauldwin* [ 358 ] Js., it seems reasonable that she shall have them, inasmuch as the cause and consideration of the gift is then defeated; for the goods were given in advancement of her marriage, and *cesante causâ*, &c. And the book cites 19 E. 3., that if land be given in frankmarriage, and afterwards the donees are divorced, the one by whom the cause of divorce was first moved, shall lose the land. As if the woman sues it, the husband shall have the land, and *e contrâ*. But *Fitzherbert* said, that there was another report of that case, which said that the land should be divided between them. And note, that about the 26th year of H. 8., upon evidence given in a writ of detinue, the Court was of opinion, "that if a woman had goods, and afterwards the husband and she

she were divorced, she should have again all the goods which were not spent." [Heath, J. So it was always, if a woman enfeoffed a man *causâ matrimonii prælocuti*, and the marriage did not take place, she should have her lands again; which comes nearer to this case.] *Lib. Ass.* 19 *Edw.* 3. fol. 60. pl. 2. Novel disseisin between a woman plaintiff and a man defendant, before *Shard* and *Stof*. It was found by verdict that the father of the plaintiff gave to the defendant the lands in frankmarriage, when they were *infra annos nubiles*, both the one and the other; and that afterwards, at their full age, the man was divorced, and that, with the good will of the woman; and that the divorce was made at the suit of the husband, and after the divorce he kept possession of the entirety, and ousted the woman, whereupon she brought assise; and because she was the cause of the gift, and the frankmarriage was terminated by the divorce at the suit of the husband, it was agreed that she should recover the entirety. *P.* 19. *E.* 3. *Assises* 83. *Co. Litt.* 204. a. And yet sometimes in case of lands or tenements, *causâ* shall make a condition. As if a man give land to a man and his heirs, *causâ matrimonii prælocuti*, in this case if she marry the man, (for (a) so it is printed in all the editions, but the sense seems to require that it should be "if she either refuse to marry the man,") or the man refuse to marry her, she shall have the land again to her and to her heirs. Whether it be the case of a divorce, or of a marriage void *ab initio*, so that the foundation fails, *causâ*, it can make no difference; and the deed of 1799 was therefore void, and *Frederica Emma Laura* takes no estate under it. Before the deed of 1800 was executed, *Lady Boughton*, therefore, had the uses to herself in fee, and *Sir Geo. Boughton* did not take even a life estate under the recovery and deed of 1799. It remains to consider the effect of the subsequent deeds and recovery. It is immaterial to the plaintiffs whether the deed of 1799 was wholly void, so that there was no good tenant to the precipe, and so the recovery bad, or whether the uses declared were alone void: for if the deed of 1799 being wholly void, the first recovery was bad, *Lady Boughton* continued tenant in tail, until the entail was well barred by the second recovery: if the first recovery was good, *Lady Boughton* was tenant in fee when she executed the deed of 1800, and suffered the second recovery; but a recovery suffered by a tenant in fee does not in anywise

1811.

BOUGHTON  
v.  
SANDILANDS,

[ 359 ]

(a) Upon referring to the text it seems probable that the learned commentator wrote it as it is printed.



1811.  
 BOUGHTON  
 v.  
 SANDILANDS.

[ 360 ]

impair or weaken that estate; and the deed of 1800 gives her as ample a power of disposition over the estate as can be created. If, however, the uses of the deed of 1799 were not void, it might be thought that the deed of 1800 was an appointment made by Lady *Boughton* and Sir *George Boughton*, in pursuance of the power contained in the first settlement; but it is impossible to sustain that proposition, because the parties evidently never intended it as an appointment; on the contrary, they set out in the beginning of the deed of 1800, with declaring that the deed of 1799 was void already, but in case it were not, they do all they can to rescind it; we cannot therefore argue that they meant to act under it. But these two persons together were evidently able, either jointly, or both, or one of them, separately, to dispose of the whole estate as they did; and whether the estate moved from the one or from the other, the effect is the same. The deed of 1802 is no more than an ordinary settlement made previous to marriage. No joint appointment has been made under the power thereby created, the life estates to the husband and wife take effect: there are no sons of the marriage, but there is a daughter, *Frederica Emma Laura*, who takes the estate tail thereby created. There have been separate appointments made by Sir *Geo. Boughton* and by Lady *Boughton*, by both under a misconception, and, supposing that the deed of 1799 is void, their appointees take no estate thereby. If, however, the deed of 1799 is good, *Frederica Emma Laura* takes an estate tail under it; for not being born until after the marriage, she comes under the legal description contained in that deed, of a daughter of *Eliza Boughton* by *G. C. Brathwaite Boughton* her husband.

[ 361 ]

For the defendant. The deed of 1799, which led the uses, and the recovery, form together but one assurance, and must stand or fall together; and as the recovery is clearly good, it will also uphold the uses declared by that deed. There is no distinction between saying that the foundation of the deed fails, and that there is no consideration for the deed; for supposing that the deed were made on a mistaken consideration, it was at most but as if made upon no consideration; and it is clear that the want of consideration does not avoid a deed. It never was yet heard of, that a recovery was void because the foundation of it failed. In a case where a fine is levied or recovery suffered, the estate passes, although there be no consideration, or the consideration never takes effect or be illegal. Before the statute of

uses, a court of equity would not enforce a contract which raised an use, without a consideration, as upon a covenant to stand seised, or the like; but since that statute, "in cases where uses pass by way of transmutation of possession, as by fine, feoffment, or recovery, there the consideration is not at all material; for he that doth make the estate, may appoint the use to whom he will, without any respect to marriage, kindred, money, or any other thing: for in this case his own will and consideration guideth the use and equity of the estate: yet in bargains and sales, and covenants to stand seised to uses, it is otherwise; for there, consideration is so necessary, that nothing will pass, neither will any use rise, without a consideration." *Sheph. Touchst.* 510, 511. 2 *Ro. Abr.* 791. line 10. pl. 1. If a man levy a fine, and covenant by indenture, in consideration of blood, and of the marriage of his bastard daughter, that the conusee shall stand seised to the use of his daughter, although this is not a good consideration to raise an use by way of covenant, yet it is sufficient upon a fine: for the will of the party is sufficient for that, without consideration. *Pl. 2. ibid.* If *A.* in consideration of 100*l.* paid by *B.* makes a feoffment in fee to *B.*, and *C.* the son of *B.*, that shall raise an use to *C.* well enough, although all the consideration was given by *B.* *Sq. Owen*, 41. *Stevens v. Layton*. Mutual covenants that *T.* the son of the one party, and *M.* the daughter of the other, should marry; *pro quo quidam maritaggio sic postea habendo*; *A.* covenanted to make an estate to *T.* and *M.*, and to the heirs of their bodies for the jointure of *M.*, and a fine was levied between *T.* and *M.* and the covenantors, to the uses of that deed. *T.* died, and *M.* intermarried with *L.* *Garsdy*, Serjt. moved that the uses should be to the conusor. *Walmsley*. It is not like the case of a covenant to stand seised, which depends on the consideration; to which all the Court agreed. Here the purpose was most express *sic postea habendo*; yet upon that sound distinction between tortious and rightful conveyances, the deed was not void, but the uses took effect. *Jones v. Boyleson*, *W. Jon.* 345. *Humphrey Hill* covenanted by indenture, in consideration of the love that he had to *William Hill*, and that he was of his surname and consanguinity, and for the preservation and continuance of the estate in the name of the *Hills*, and in consideration of a marriage to be had between *Richard Hill*, the son of the said *William Hill*, and *Ursula*, the daughter of *J. S.*: and the covenant was. to assure his lands to *Humphrey Hill* for life, with re-  
maind

1811.

BOUGHTON  
v.  
SANDILANES.

[ 362 ]

1811.  
 BOUGHTON  
 v.  
 SANBILANDS.

mainder to the said *Richard* and *Ursula*, and the heirs of the body of *Richard*; remainder to the use of *William Hill* in tail, with remainder over: a feoffment and fine were made and levied to these uses: *Ursula* married another man, and *Richard* another wife: *Humphrey Hill* died, and the question was, what estate *Ursula* had; and it was resolved by the Court, and so adjudged, that the said *Richard* and *Ursula* were joint-tenants, notwithstanding that the marriage took not effect, by moieties, and not by entireties. The difference is, that if the conveyance had been by covenant in consideration of marriage, there, if the marriage had not taken effect, the woman should have nothing; but since a feoffment and fine were made and levied to that use, it is otherwise. *S. P. S. C. 2 Ro. Abr. 792. S. pl. 2. Page v. Hayward, 1 Salk. 570. S. C. Piggot on Rec. 177.* A stranger to the estate joined in making a tenant to the precipe, and was vouched jointly; and it was held that such mistake in the intention and situation of the parties did not vacate the recovery. Much of what was there said, is applicable to this case. *S. P. Doe d. Greasley v. Nelson, ante, 2. 59.* Where a stranger joins in a conveyance, it shall be held the confirmation of the stranger; so that if the other should die, it would be the grant of the stranger by estoppel. *Co. Litt. 147. b. A. doth bargain and sell land to B. by indenture; and before inrolment, they both grant a rent-charge by deed to C., and after, the indenture is inrolled: the grant is good, and after the inrolment, by the operation of the statute 27 H. 8. c. 16., it shall be the grant of B., and the confirmation of A. But if the deed had not been inrolled, it had been the grant of A., and the confirmation of B.; and so, quacunqve viâ datâ, the grant is good. Doe ex dem. Lushington v. Bishop of Llandaff and Others, 2 New Rep. 491. [Mansfield, C. J. That case has merely decided that a man who was tenant in fee having suffered a recovery, is estopped from saying that there was no tenant to the precipe, and that therefore his devisee is also estopped.] It makes no difference that the deed describes Lady Boughton by an improper description, as wife: that will not vitiate her grant. *Perkins, Grant, pl. 40.* "If Alice at Style, reciting by her deed that she is a feme covert, and in truth she is a feme sole, grant annuity, it is a good grant, for that is but a void recital." In the case of frank-marriage, the entail is not to him and the heirs of his body, but to them and the heirs of their bodies; *Litt. s. 17.:* and the estate cannot be if the union does not take effect. This is wholly dissimilar*

[ 363 ]

dissimilar to the case of goods or lands given *causâ matrimonii prælocuti* before the statute of uses. All the plaintiff's arguments are drawn from the practice of a court of equity, and are not admissible here. Equity may look at the supposed marriage as the consideration of this deed, but at law the marriage is not the consideration; the deed is made in consideration of five shillings, and to the intent to make a tenant to the precipe for suffering a common recovery: and that consideration, the only one to which this Court can attend, neither fails, nor is mistaken. This is nothing like the case of a condition precedent: a condition precedent does not consist in facts not known to the parties at the time, and which being afterwards discovered, render the grant void. On the contrary, it is a thing known, and either implied in law, or expressed, upon which being done, the estate vests. A condition implied differs in this respect only from a condition expressed, that the law makes the condition resulting out of the contract of the party. It has been objected that the uses limited to the children of Lady Boughton by Sir George Boughton, her husband, were too remote at the time of making the first settlement; but these springing uses and contingent uses arise every day, since the statute of uses. There are many common law cases before that statute, in which it has been held that such uses were bad. But though it is clear that the uses to the issue could not take effect unless the parents became husband and wife, yet it was by no means impossible for them to become such, and to have issue of the marriage; and the very case has happened. *King v. Melling*, 1 Vent. 228. "It cannot be denied but that a devise to a man and the heirs of his body by a second wife makes an estate tail executed, though the devisee had a wife at the time, as the case often cited; land given to a married man and a married woman, and the heirs of their bodies:" 18 Vin. Abr. 395. *Reminder*, (G) pl. 19.: for the feme of the married man, and the baron of the married woman, may die, and then the survivors may intermarry and have issue; and that is a much more remote contingency than in the present case. But supposing those uses were too remote, still that would not avoid the whole deed. It is a principle coeval with the law itself, that a deed may be good in part and bad in part; as Ld. Kenyon C. J. admitted in the case of *Estwick v. Cailland*, 5 T. R. 420., although he held that the doctrine was not applicable to that case. *Norton v. Simmes*, Hob. 14. The common law doth divide according to common reason, and having made that void that is against law, lets the

1811.

BOUGHTON  
v.  
SANDILANDS.

[ 364 ]

rest

1811.  
BOUGHTON  
v.  
SANDILANDS.  
[ \*365 ]

rest stand. *Collins v. Blantern*, 2 Wils. 351. acc. *Osgoode v. Strode*, 2 P. Wms. 245., and *Fursaker v. Robinson*, *Proc. in Chan.* \*475., was there cited. Part of the deed was held bad, and part good. [*Mansfield*, C. J. Surely it will not be contended with you at this day, that a deed may not be good in part and bad in part, unless that which is bad, being void, by necessary implication makes the whole void.] The limitations of the deed of 1799 being therefore good, the deed of 1800 is of no use or effect: for what was it? Sir G. Boughton being seised for life, with remainder to Lady Boughton for life, he, according to such estate or interest as he had in the premises, and she also, granted to Farrer, during the life of Eliza: this therefore enured as a grant by Sir G. Boughton and a confirmation by Lady Boughton to Farrer and his heirs during the life of Lady Boughton, which was a less durable estate than he had before, so that the estate would devolve to the heirs of Farrer, upon the decease of Eliza as special occupants: the uses were declared to enure to such persons as Eliza should appoint. It is not clear that Sir G. Boughton could grant such an estate, but if he could, it could only be to such uses as could arise during the life of Lady Boughton; so that the uses limited by the deeds of 1800 and 1802 could be of effect only for the life of Lady Boughton; consequently those deeds are not applicable any further than they are consistent with the first deed. It is said the deed of 1800 might operate as an appointment under the deed of 1799. Sir G. Boughton and Lady Boughton certainly might, after the deed of 1799, have executed their power of joint appointment, and thereby have destroyed the contingent estates tail to the issue of their future marriage, if any such should be born; but in order to do that, they must have acted under and recognized their former deed: whereas it is evident from the recitals of the deed of 1800, they do not mean to affirm that which had been done, and to declare new uses under it, they come to rescind and destroy. The deed of 1799 made a good tenant to the precipe, and the recovery suffered is good. It is said and it is clear law, [*Abbot v. Burton*, 1 Salk. 591., that if no uses of the recovery are declared, the recovery shall follow the legal estate at common law, and enure to the use of the person by whom it is suffered in fee; but it is settled that where any uses of a recovery are declared, no other uses shall arise by implication. *Tipping v. Czerns*, 1 Ld. Raym. 35. That recovery therefore enured to the uses of their joint appointment, and until that should

[ 266 ]

should be executed they took vested estates to Sir G. Boughton for life, remainder to Lady Boughton for life, remainder to *Farrer* to support contingent remainders, with remainder to the sons and daughters successively in tail, &c. with a power of appointment in default of issue to Sir George Boughton, over the fee, in case of his survivorship, and the ultimate remainder to him in fee. But the joint appointment not having been executed, it must be admitted that *Frederica Emma Laura* takes the estate tail under that first deed, and the appointee of Sir George Boughton, in whose favour the ultimate appointment has been exercised, also takes an estate in fee expectant on the determination of her estate tail. Neither *Frederica Emma Laura* therefore nor C. D., the appointee of Lady Boughton, takes any estate under the second settlement.

In reply it was observed, that the Lord Chancellor seemed to attach weight to the circumstance, that the deed of 1800 conveyed to the tenant to the precipe an estate during the life of Lady Boughton only: but that estate was equally sufficient to make a tenant to the precipe as an estate in fee would be. It is admitted by the plaintiffs, that the first recovery was not void: but that does not therefore follow, which is urged upon the ground that the recovery and deed to lead the uses are one assurance, as to some purposes they are, that the recovery, being good, upholds the ulterior uses declared by the deed. [*Mansfield*, C. J. There can be no doubt but that a recovery may be very good, and the uses declared may be bad: suppose a good tenant made to the precipe, and the tenant in tail suffers a recovery, and then by deed declares superstitious uses, or any other uses void in law; it would nevertheless be a good recovery to bar the estate tail: so if he declares uses constituting contingent estates more distant than the law will allow, the recovery may nevertheless be good. Nothing in the mis-description of the persons, calling themselves husband and wife, will vitiate the recovery.] These uses do depend, (which has been denied,) upon the parties being husband and wife. The plaintiffs do not put it on the ground of a conveyance executed by mistake: there the Court of Chancery would compel the parties to do that which ought to be done: but here was a marriage in fact, though not in law, and the Court of Chancery would not have compelled these persons to become husband and wife. In the case of *King v. Melling*, the uses were not impossible, although they were likely not to arise so soon as is ordinary in marriage settlements

1811.

BOUGHTON  
v.  
SANDILANDS.

[ 367 ]

1811.  
 ———  
 BOUGHTON  
 v.  
 SANDILANDE

[ 368 ]

ments. In this case, as things then stood, the uses were become impossible. There never could be a legal son or daughter of the marriage *theretofore had*, and the defendant has not been hardy enough to contend that the uses extended to all issue legitimate or illegitimate of those two persons. It is said the facts must be known upon which a condition depends; here all the facts were known to the parties: they were ignorant only of the legal effect of them, and *ignorantia juris neminem excusat*: and since the thing done proves not to be the same thing, nor to have the same legal effect, which was intended, the want of that intended act prevents the estate from taking effect. [*Mansfield, C. J.* agreed that *King v. Melling* was not applicable, but said this was not a mistake in law, but a mistake of fact; for it was not known that the mother had a husband living.] The case of *Doe ex dem. Lushington v. Bishop of Llandaff* is not applicable: that was a mere case of misnomer. Neither is this a case of estoppel. The only material arguments that have been used, are those which tend to establish the goodness of the first recovery, from which it will follow that *Frederica Emma Laura* takes an estate tail under one of the settlements, and as the plaintiffs contend, under that of 1802. The distinction between uses which take effect by transmutation of possession and those which do not, has, in the defendant's argument, been pushed too far: for suppose a man already married to enter into such a deed as the first settlement, it would follow that (setting the consideration of fraud out of the case) so far as respected the statute of uses, that deed would be good. The deed however would in that case clearly be void; and void, not in respect of any previous criminal act, for the first marriage would have been lawful, but on account of the previous indissoluble contract creating a disability. Here it is void on the account of the disability of nonage. It is not contended for the plaintiffs that the nullity of the first marriage makes void the use limited to *Frederica Emma Laura* in tail, but that that use never arises; and that the marriage never having taken effect, those uses of the deed which depend on the marriage, namely, the life estates to the husband and wife, are void. [*Mansfield, C. J.* The cases cited for the defendant are very strong to put the operation of a fine or recovery upon the will of the parties; and to guard against that it is, that all settlements are made to give the use to the settlor until the marriage: if that intermediate use were not limited, the settlor might aliene before the marriage. No argument has been raised from the

the

the cases of contracts for the sale of goods, for building houses, or the like. Such contracts, whether under seal or not under seal, if they proceed on a clear mistake on both sides, are void. Suppose a man and woman covenant to marry, both being married, but both understanding their husband and wife to be dead: would not that covenant be void? And, here if instead of a conveyance having been actually made, the contract had still rested in covenant, Sir G. Boughton would never have had the estate: so that it all rests upon the difference between a covenant and an actual legal conveyance. *Heath, J.* Upon a lease where the lessor has covenanted that the lessee shall enjoy during the term, and the lessor had no power to lease, so that no term exists, the covenant is gone. *Lawrence, J.* Suppose a relation of the parties had, without any valuable consideration, but merely on account of his friendship for them, made a feoffment, in contemplation of the marriage had, to the husband for life, with remainder to the wife for life, remainder to the children of the marriage: would that feoffment prove void, and carry nothing if it turned out that they were not legally married? The deed would be void, if it purported to convey to them by that description, for it would be the very case of frank-marriage, *Litt. s. 17.*

1811.

BOUGHTON  
v.  
SANDILANDS.

[ 369 ]

*Cur. adv. vult.*

In Michaelmas term 1809, the Court observed that there was one point which had not been discussed in the foregoing arguments, viz. Considering the first deed as good, what would be the effect of *Farrer*, the trustee to support the contingent remainder to the daughters in tail, joining in making the tenant to the precipe for suffering the second recovery? Supposing that the contingent remainder could not otherwise be supported, would not that deed and recovery have the effect of destroying his estate, before any of the contingent estates came into esse? He was a mere tenant for life: whether for his own life, or that of another, differs not. By suffering a recovery, he disavows the title of his lessor for life, and incurs a forfeiture. The consequence would be, the letting in any of the subsequent uses of the first settlement; it might let in the power of the husband to appoint in fee. Does it not therefore destroy the particular estate, out of which all the subsequent uses in that deed were to spring? If the only question were, whether the first deed were void, the Court was now prepared easily to

[ 370 ]



1811. to answer that question. Supposing there had been no subsequent recitals, deeds, recoveries, or transactions, what is the objection to that deed? The limitation is, to a man and woman, who call themselves husband and wife, and to their sons and daughters. That can only mean legitimate sons and daughters. Although the parties call themselves husband and wife, when they are not, they marry afterwards; and why are not the limitations to the sons and daughters of that marriage good? Some of the plaintiffs have in certain respects conflicting interests; and as the Court of Chancery has sent hither two questions on the effect of the appointments, it is fit they should be argued on behalf of the several persons who have the conflicting interests; and it will be unnecessary to discuss the effect of the first recovery; but, assuming the first recovery to be good, consider what effect the second recovery will have, so far as regards the appointments by the husband and wife.

Upon the third argument, in *Hilary* term 1810, *Lens* appeared for Lady Boughton, Frederica Emma Laura, her daughter, and for C. D., her appointee, mentioned in the fourth question. He contended now, that the deed of 1800, which was, he said, executed in presence of two witnesses, took effect as a good joint appointment by Sir G. Boughton and Eliza, under the first power limited to them in the deed of 1799. He said he had been compelled to abandon this proposition before, so long as he argued that the deed of 1799 was void, but now, since that deed was held to be good, he was at liberty to argue that although in the recitals the parties considered that deed as void, and did not intend to act under it, yet that the Court must consider what they actually did, not what they intended to do. The object of the deed of 1800 was to destroy the supposed estate tail of Lady Boughton, proceeding on the supposition that the former deed and recovery had not that effect. Sir Geo. and Lady Boughton jointly appoint to Farrer to make him tenant to the precipe; and the first use declared of the recovery, is to the sole appointment of Lady Boughton. Although they had no reference to the power, and no conception of its continuance, yet the first deed being effectual in spite of them, it shall be effectual for all purposes that could afterwards affect the property, and good for this purpose as well as for others, *ut res magis valeat quam pereat*, for otherwise the deed of 1800 will not operate at all, but the whole will be left in the same state as it was after the execution

[ 371 ]

execution of the deed of 1799. [*Mansfield*, C. J. Is there any case where a deed has been held to be an execution of a power, unless it could be presumed, that the parties might have meant it in execution of their power?] If it cannot operate in this way, yet, Sir *Geo.* and Lady *Boughton* and *Farrer* had between them the whole estate, and they all join in the deed of 1800, to dispose of it by recovery. [*Mansfield*, C. J. By that deed they make a good tenant to the precipe; and I suppose it will not be disputed by the defendant, that a recovery suffered and a deed to lead the uses, will operate as a conveyance.] *Farrer* having by this recovery, before the birth of the daughter, conveyed away his estate, which was to support the entail to the daughter, which was a contingent estate, the entail drops: for even if there were no difference between the uses of the deed of 1800 and those of the first settlement, there has been a transmutation of possession which makes it impossible to hold that *Farrer* continued after that recovery to be seised of the same estate, which he had under the deed of 1799. In these circumstances as well Sir *Geo. Boughton* as Lady *Boughton* and *Farrer* become parties to the deed of 1802, in which Lady *Boughton* takes a power of appointment in fee, subject only to the estate tail which her daughter *Frederica Emma Laura* takes under the third use of that settlement, which is the first interest the daughter can take: the answers to the questions therefore are, to the first, that the deed of 1799 was not null and void. 2. That *Frederica Emma Laura* by the joint effect of the several deeds takes an estate tail by the declaration of uses which her mother was entitled to make in her favour. 3. The deed of 1799 being valid to certain purposes, Sir *Geo. C. B. Boughton* takes nothing under that deed; but his power of appointment and his interest are done away by the subsequent events and transfers, and *A. B.*, his appointee, takes no estate. 4. *C. D.* the appointee of Lady *Boughton*, is to take only by will, not by deed, and is capable therefore of being changed at any time before the death of Lady *Boughton*; but if her will be not revoked, he will be entitled, subject to the estate tail of *Frederica Emma Laura*: he said that appearing on behalf of the daughter only, he should contend that *C. D.* had no estate; but if he appeared on behalf of *C. D.* it would be his interest to contend that the daughter had no estate: but he did not see how that proposition was to be supported.

*Williams*, *contra*, agreed that he should come nearly to the same conclusion by a different course. It does not appear by the

1811.

BOUGHTON  
v.  
SANDILANDS.

[ 372 ]

1811. the case, that the deed of 1800 was executed in presence of two witnesses, which is necessary. *Hawkins v. Kemp*, 3 *East*, 440.

BOUGHTON  
v.

SANDILANDS.

In the deed of 1800 it is material to observe that Sir G. C. B. Boughton and Lady Boughton granted the premises to Farrer for the life of Lady Boughton; Farrer was to vouch, not both, but Lady Boughton only: the uses were to be such as she should appoint; and in default to Farrer and his heirs during her life, with remainder to her in fee. They thus give to Farrer an immediate vested estate in possession; before, he had it in remainder only. He is therefore the man against whom the precept lies. What did Sir George Boughton convey by this deed? He before had an estate for his own life, and a vested remainder in fee; and as well the reversion to himself for life expectant on the decease of Lady Boughton, as also the fee may well pass; and by this lease and release conveying his fee, he extinguished his power of sole appointment. *Penn v. Peacock*, *Forrest*. 41., *S. C.* 2 *Eq. Cas. Abr.* 136. Lord Talbot held that a lease and release, or any other conveyance, will carry with them all powers

*A.* being seised in remainder during the life of *B.* and *C.*, and the survivor, in trust to preserve contingent remainders, takes an estate in possession to him and his heirs during the life of *C.*, to make him tenant to the precept, and a recovery is suffered against *A.*, the contingent remainders are saved by the statute 14 *Eliz.* c. 8.

that are joined to the estate. By the statute 14 *Eliz.*, c. 8., all recoveries had against any particular tenant, or against any other, with voucher over of such particular tenant, shall, as against all persons in remainder or reversion, be utterly void and of none effect. And therefore, though this recovery might be good against Sir Geo. Boughton, it was not good against them in the contingent remainders, and so, clearly void against the daughter. But see what estate Farrer had! He had an immediate estate in possession during the life of Lady Boughton, with remainder after the determination of that estate to himself during the joint lives of Sir George and Lady Boughton, and the life of the survivor; and his right of entry was sufficient to support the contingent remainders; so that instead of leaving a vested remainder in Sir Geo. Boughton, the vested remainder is conveyed to such uses as Lady Boughton should appoint, and for want of appointment, to Farrer and his heirs during the life of Lady Boughton, subject to the uses for the issue in the first deed, with remainder to Lady Boughton in fee. The last deed of 1802, made while the estate was thus circumstanced, is extremely material. The parties are Sir Geo. Boughton, who had nothing; Farrer, who was trustee to preserve the contingent remainders; and Lady Boughton. By this deed, before any of the contingent remainders subsequent on Farrer's life estate came in *esse*, Farrer conveys the premises, as he legally might

might, by lease and release. That destroyed all the uses of the first deed, and let in the uses of the second. If the second deed had not been made, but the first only, and Sir *Geo. Boughton*, Lady *Boughton*, and *Farrer* had conveyed to other uses, the fee would have passed from Sir *Geo. Boughton*; and the contingent remainders being destroyed, new uses would have taken effect. The same effect is produced by the operation of these two last deeds taken together. The principle is clearly established, 2 *P. Wms.* 678, *Mansell v. Mansell*, where the trustees to preserve the contingent remainders did not join in the feoffment of the tenant for life, but conveyed by a separate lease and release, and it was held that the contingent remainders were thereby destroyed. The first deed then is got rid of, not by the exercise of the power of appointment, but by shewing that Sir *Geo. Boughton* conveyed away the fee by the second deed, and made it subject to the power of appointment given to Lady *Boughton* in the third deed. *Frederica Emma Laura* does not take any estate in the premises under the deed and recovery of 1799, and the proposition recited in the deed of 1800, that the deed of 1799 was void, is not true, but *Frederica Emma Laura* did take an estate tail under the deeds of 1800 and 1802; consequently Sir *Geo. Boughton* takes an estate for life precedent to the estate to his daughter, with remainder to Lady *Boughton* for life, with remainder to *Frederica Emma Laura* in tail. *A. B.*, the appointee of Sir *Geo. Boughton* is not entitled, and *C. D.* is not entitled, because Lady *Boughton* can only appoint by will, and is still alive.

*Lens* in reply. The deed of 1800 may well operate as an appointment; for if the parties had the power of doing that which they purport to do, and have done it in substance, it shall take effect: as a grant may enure by way of confirmation, and a confirmation by way of grant, if the parties mistake their respective interests. The statute 14 *Eliz.* is not applicable, for it was intended to prevent a recovery from the tenant for life being suffered by covin. But here, the party against whom the recovery is had, had the next estate in remainder, and the remainder-man in fee joins, and therefore the recovery shall operate against all the estates that were in being, and they being destroyed, the contingent remainders drop. The trustees to preserve them can convey, although it be a breach of trust: and these parties have the whole estate in them, no

Vol. III.

T

other

1811.

BOUGHTON  
v.  
SANDILANDS.

[ 375 ]

1811.  
BOUGHTON  
v.  
SANDILANDS.

other person had any estate then subsisting, and the simple way of considering the case is, to hold that the contingent remainders were destroyed by *Farrer's* joining in the recovery: the land was conveyed to him for the very purpose of being recovered from him, and it is impossible to say that after the estate was recovered from him, he had any remainder or reversion left. If therefore *Farrer* has destroyed his own estate, and has himself taken a new estate, and had that destroyed also, it is impossible to say that the contingent remainders are not destroyed. As there was no entail to be docked, the form of recovery was no longer material, but Sir *Geo. Boughton* grants a greater interest than could be served out of his life estate, and which must therefore be served, either out of his power of appointment, or out of his fee: whichever way of considering it is adopted, even if *Farrer's* estate to preserve contingent remainders survived the second recovery, it was destroyed by the last deed; and Sir *Geo. Boughton* has now nothing in him except his estate for life, and his ultimate remainder in fee, in case Lady *Boughton* should die without making a good appointment by will. In such case, and if the tenant in tail should die without issue, *A. B.* might take, rather as grantee or devisee, than as appointee of Sir *Geo. Boughton*.

*Cur. adv. vult.*

[ 376 ]

At the end of this vacation the Court of Common Pleas sent to the Lord Chancellor the following certificate.

1st Answer.—Having heard the arguments of counsel upon this case, and considered the several questions proposed to us, we are of opinion that *Frederica Emma Laura*, the daughter of the said marriage, took an estate tail in remainder in the premises, by virtue of the deed and recovery of 1799; the proposition recited in the deed of the 27th day of June 1800, that the deed of the 1st May 1799 was absolutely null and void, not being true in law.

2d Answer.—We are also of opinion that the said *Frederica Emma Laura*, the daughter of the said marriage, did not take any estate in the premises by virtue of the deed of the 27th June 1800, the recovery suffered according thereto; and the deeds of 1802, or any of them.

3d Answer.—We are of opinion that *A. B.*, the appointee of *George Charles Brathwaite Boughton*, is entitled to an estate in

in fee simple, in remainder after the determination of the former estates created by the deed and recovery of 1799. 1811.

4th Answer.—We think that *C. D.*, the appointee of *Eliza Boughton*, is not entitled to any estate in the premises.

BOUGHTON  
v.  
SANDILANDS.

J. MANSFIELD,  
J. HEATH.  
S. LAWRENCE,  
A. CHAMBERLAIN.

END OF MICHAELMAS VACATION.

[ 377 ]

# C A S E S

1811.

---

ARGUED AND DETERMINED

IN THE

COURTS OF COMMON PLEAS,

AND

EXCHEQUER-CHAMBER,

AND THE

HOUSE OF LORDS,

IN

Hilary and Easter Terms,

In the Fifty-first Year of the Reign of GEORGE III.

Jan. 23.

STEYNER v. COTTRELL.

An affidavit, the title of which styles the plaintiff "assignee," without further explanation, is bad.

THE plaintiff sued as assignee of a bail-bond. *Best*, Serjt. had obtained a rule *nisi* to set aside the proceedings for irregularity.

*Shepherd*, Serjt. shewed for cause, that the affidavits, on which the rule was obtained, were entitled *Steyner*, assignee, against *Cottrell*, without explaining of whom or of what he was assignee. *The Court* held the defect fatal, and

Discharged the rule.

[ 378 ]

DOE, on the Demise of LORD CARLISLE, v. Bailiff and Burgesses of MORPETH.

Jan. 25.

If, upon a reference, either party is precluded by the terms of the rule from

going into evidence of that which he is desirous to try, his remedy is to move to set aside the rule of reference; but he cannot impeach the award.

THIS was an ejectment brought to recover 447 acres of land called the *Gubion*, otherwise the *Gudgeon*, otherwise the *High Moor*, otherwise the *High Common*. At the trial there

was

was no doubt that the lessor was entitled to some land called the *Gubion*, and that the defendants had occupied it as tenants to him; but the defendants contended that the lessor was entitled only to a small farm called the *Gubion* farm, containing 50 or 60 acres, and distinct from the *High Common*, which they claimed to be their own soil and freehold. A verdict was taken by consent for the plaintiff, referring it to a gentleman at the bar, "to ascertain the boundaries of the *Gubion*, otherwise the *Gudgeon*, otherwise the *High Moor*, otherwise the *High Common*." The defendants, before the arbitrator, would have gone into evidence to confine the lessor's title to the *Gubion* farm, but he considered himself as precluded from going into any matter of title by the rule of reference, according to the terms of which, he defined the boundaries of that, which the terms of the rule described, namely, the whole premises in dispute. *Cockell*, Serjt. had, in the last term, obtained a rule *nisi* to set aside the award, upon the ground that the arbitrator had refused to hear evidence of the defendant's title to the *High Common*.

*Lens*, Serjt. now shewed cause. The defendants relied on the smallness of the rent, 10*l.*, reserved in an ancient lease granted by the ancestor of the lessor of the plaintiff, as sufficient evidence to shew that the whole of this tract of land, now of very great value, was not demised by that lease; but this fact does not afford sufficient proof of their proposition.

*Cockell* and *Clayton*, Serjts., contra. The question to be tried was, of what land the *Gubion* consisted; the defendants had an estate called the *High Moor*, distinct from this.

MANSFIELD, C. J. The reference clearly supposes the *Gubion* and the *High Moor* to be the same thing, and that the lessor was entitled to them. We cannot, on such a rule of reference, set aside this award. The defendant's motion, if any, ought to have been, to set aside the order of reference, upon affidavits shewing that it was drawn up by mistake. The award is perfectly right.

LAWRENCE, J. The defendants mean to contend that the plaintiff is entitled only to the *Gubion*, and to so much of the *High Moor* as is commensurate with the *Gubion*: the point is decided by the award. The award cannot be consistent with the rule of reference, unless it finds the boundary of the *Gubion* as well as of the *High Common*.

1811.

DOE,  
Lessee of  
LORD CAR-  
LISLE,  
v.  
Bailliff, &c. of  
MORPETH.

[ 379 ]

Rule discharged.

HAGE-



1811.

Jan. 25.

## HAGEDORN v. ALLNUTT.

The costs of a witness coming from beyond seas, are to be allowed only from his coming within the jurisdiction of this Court.

[ 380 ]

**BEST**, Serjt. moved that the prothonotary might review his taxation of costs in this cause, because he had refused to allow to the plaintiff, who had obtained a verdict on a policy of insurance, the sum of 45*l.* for the costs of a witness whom he had been obliged to bring from *Hamburgk*. It was impossible, he said, that where witnesses are necessary to be brought from a foreign country, persons can prosecute their rights to recover any but very large sums, unless the costs of such witnesses are allowed. The Court inquired of the officer what the practice had been in the like cases; and found, that all the costs of bringing hither witnesses who came from abroad, had been allowed, until within a few years, when 7 or 800*l.* being claimed in one case for the costs of bringing over a single witness, the Court directed, that costs should be allowed only from the time of his coming within the jurisdiction of the process of this Court; and that rule had since been adopted in all subsequent cases.

*The Court* thought that it would be a proper thing to re-consider that rule of practice, but that until it was overturned, it would be better to abide by it, and

Refused the rule (a).

(a) But the practice is now altered. See post. vol. 4. *Cotton v. Witt*, Trin. term 1811. July 1.

Jan. 26.

## COLTMAN v. MARSH.

"I owe you not a farthing, for it is more than six years since," is not to be left to the jury as evidence of an admission, to take a debt out of the statute of limitations.

**VAUGHAN**, Serjt. moved to set aside a nonsuit and have a new trial. The action was brought for the price of some glass sold. The defendant pleaded the statute of limitations: the evidence given at the trial was, that the defendant had said to the plaintiff, "I owe you not a farthing, for it is more than six years since;" which *Vaughan* contended ought to have been left to the jury, to consider whether it did not amount to an admission of the debt. He referred, in support of this position, to Lord *Mansfield's* doctrine in *Truman v. Fenton*, 2 *Corp.* 548. *Lloyd v. Maud*, 2 *T. R.* 760. *Bryan v. Horsman*, 4 *East*, 529.

LAWRENCE,

LAWRENCE, J. According to that doctrine, if a man pleaded *non assumpsit* and the statute of limitations, the plea of the statute of limitations would disprove the plea of *non assumpsit*. In the case of *Bicknell v. Keppel*, 1 *New Rep.* 20., where the defendant wrote that his solicitors "were in possession of his determination and his ability," the Court held there was not enough in the word "ability," unexplained, to take the debt out of the statute. In this case the defendant's clerk swore that the defendant's books of account had all been burnt, and the plaintiff's clerks were dead.

The Court was unanimous that there was nothing to be left to a jury, and

Refused the application.

1811.

COLTMAN  
v.  
MARSH.

---

FORT v. LEE.

Jan. 25.

A Policy was effected in *London* the 24th of *May* 1808 upon a ship on a voyage at and from *London* to her port of discharge, lost or not lost. The ship sailed on the last day of *April*, which fact was not disclosed to the underwriters; and a broker, who was called, said, that if he had known of the ship's sailing, he should have thought it a circumstance material to be communicated, although he admitted, that if at the time of effecting the policy she had sailed only a week, he should have thought it immaterial. The plaintiff having obtained a verdict, *Best*, Serjt. for the defendant, now moved to set it aside, upon the ground, that the time of the ship's sailing was a material circumstance, and although known, had not been communicated to the underwriter.

It is not necessary to disclose to the underwriter on a policy at and from *London*, whether the ship has sailed or not.

But the Court said that if the underwriter had wanted to know whether the ship had sailed, he ought to have inquired, and unanimously

[ 382 ]

Refused the rule.

---

CORDER v. DRAKEFORD.

Jan. 26.

THIS was an action of *assumpsit* for the price of certain fixtures of the value of 57*l.* 15*s.* The plaintiff, to prove his case, tendered in evidence an instrument in which the de-

is cannot be given in evidence to prove the sale of the goods, unless it has a lease stamp. Although it had an agreement stamp.

If a lease in writing, contain a contract for the purchase of goods,

fendant

1811.  
 ———  
 CORDER  
 v.  
 DRAKEFORD.

defendant agreed to purchase the goods at the specified price, but it bore only an agreement stamp, although it contained a present demise of the house in which the goods were. This instrument was rejected, as not being admissible evidence of the contract for the purchase of the goods, for want of a lease-stamp.

*Best*, Serjt. now moved to set aside the nonsuit. He contended that although the paper would not be admissible as evidence of the demise; he might nevertheless use it to ascertain the value of the goods.

MANSFIELD, C. J. It was never intended that the defendant should buy the fixtures if he could not have his lease of the premises. The one contract was auxiliary to the other.

LAWRENCE, J. The contract for the goods as well as for the house, is by an instrument which amounts to a lease, and which the law says, must therefore have a lease stamp, and that unless it has such an one, it cannot be given in evidence.

Rule refused.

[ 383 ]

<sup>b</sup> Jan. 29.

BUCKNEY, Executrix, v. METHAM.

A mortgage deed, containing a covenant for the repayment of the money, is within the meaning of the stat. 3 Jac. 1. c. 8., a contract upon which bail in error is necessary.

THE plaintiff had obtained judgment in debt on the covenant for repayment of the money contained in an indenture of mortgage: the defendant having sued out a writ of error, but not perfected bail in error, the plaintiff sued out execution.

*Vaughan*, Serjt. having obtained a rule to set aside the execution for irregularity, upon the ground that the practice had hitherto been to require no bail in this case, under the statute 3 Jac. 1. c. 8., as not being a contract within the meaning of that act,

*Lens*, Serjt. now shewed cause. A contract under seal is not therefore the less a contract, because it happens to be under seal. In *Butler v. Brushfield*, 10 East, 407, it was indeed held, that bail in error was not requisite in the case of debt on a bond conditioned for performance of all the covenants in an indenture as well as the payment of money; but the reason of that was, because the statute expressly mentions an obligation with condition for the payment of money only, which excludes all

all bonds with other conditions, but that restriction applies only to bonds.

*Vaughan, contra.* This is a new attempt. The legislature could not have meant to include under the term contract, an instrument under seal of so high and solemn a nature as this. It has been holden that an action for goods sold and delivered is not an action upon a contract. [*Mansfield*, C. J. It is very difficult to say upon what reason that ever came to be ruled. As to the bond for performance of covenants, if it were good for one covenant, it was good for all.] In *Butler v. Brushfield*, though the bond was for performance of all covenants, the covenant for the payment of the money was the only one on which a breach was assigned, and the only one, so far as appeared, into which the defendant had entered.

MANSFIELD, C. J. It is impossible to contend that a covenant is not a contract.

Rule discharged with costs.

1811.

BUCKNEY  
v.  
METHAM.

[ 384 ]

---

STEVENS v. INGRAM.

Jan. 29.

THE plaintiff obtained an interlocutory judgment on 1st of June, in *Easter* term. The defendant in the same term sued out a writ of error, returnable on the first return-day in *Trinity* term, which was allowed on the 4th of June, in *Easter* term. The plaintiff was not served with the allowance of the writ of error until after it was spent: but in *Michaelmas* term, on the 9th of November, after the service of the allowance, he taxed his costs, and signed final judgment, that being the earliest time at which he could have signed it.

If a writ of error is sued out before final judgment, but the allowance not served until after the writ of error is spent, the plaintiff may afterwards regularly sign final judgment.

*Shepherd*, Serjt. had obtained a rule *nisi* to quash the writ of error;

*Best*, Serjt. shewed cause upon the authority of *Jacques v. Nixon*, 1 T. R. 280, where it was held that the plaintiff could not lie by till a writ of error was spent, and sign judgment afterwards.

*Shepherd* supported his rule by the distinction, that there the plaintiff had notice, by being served with the allowance of the writ of error, on the same day that it was allowed. Here, the writ of error was spent before there was any service of allowance, or notice of it.

[ 385 ]

The

## CASES IN HILARY TERM,

1811.

STEVENS  
v.  
INGRAM.

*The Court held that the defendant should have waited until the plaintiff taxed his costs, before he took out his writ of error. The writ of error was spent when the allowance was served, and therefore judgment might be signed.*

Rule absolute.

Jan. 29.

LAUGHTON v. RITCHIE.

In an action on a deed made beyond seas, the defendant relying in some of his pleas on matters of defence which necessarily imported the execution of the deed, the Court would not permit him to plead *non est factum*.

**COCKELL**, Serjt. had obtained a rule *nisi* to plead several matters in an action upon a charter-party by deed; viz. 1. *Non est factum*; 2. Payment of freight, and some others.

*Shepherd*, Serjt. now shewed cause. The charter-party was made in the *West Indies*, and a witness must be brought from thence with great delay and expenses to repel the first plea, and as the other pleas pretty clearly shew that the charter-party has been executed, the Court will restrain the defendants from pleading *non est factum*.

*Runnington*, Serjt., for *Cockell*, *contra*.

*The Court* made the rule absolute to plead all the pleas except the first.

[ 386 ]  
February 5.

SAMUELS v. DUNNE.

If a defendant files two pleas at several times on the same day, in order to mislead the plaintiff by the second plea, the plaintiff may sign judgment.

Although a defendant conducts his cause in person, if he files a special plea, it is a nullity, unless it be signed by a serjeant or counsel.

**ASSUMPSIT** on a bill of exchange, for work and labour, &c. The declaration was delivered on the 16th of *November*, with notice to plead within four days. The defendant who was a surgeon in the navy, and conducted his cause himself, on the 20th of *November* first caused a plea of the general issue to all the counts to be put on the file: he afterwards, on the same day, but after many other pleas had been put on the file, caused to be filed a plea of *non assumpsit* to the first count, and a special demurrer to the other counts, assigning frivolous causes of demurrer; this demurrer was not signed by counsel. The plaintiff, upon searching for a plea, found the plea last filed, and not conceiving that there could be another plea, and deeming himself entitled to treat this as a nullity, because it was not signed by counsel, on the 21st of *November* signed interlocutory judgment. *Best*, Serjt. on a former day had obtained a rule *nisi* to set aside that judgment, upon an affidavit made by the defendant, that he had in due time, and previous to the signing of the judgment, pleaded a regular plea of the general issue.

*Vaughan*

*Vaughan*, Serjt. shewed cause upon an affidavit of the plaintiff's attorney, that he, having found the plea and special demurrer above-mentioned, had been misled by them.

*The Court* directed an inquiry to be made, which of the two pleas was first filed; and upon the officer reporting that the simple plea of *non assumpsit* was first filed, the Court held that the second plea was a deceit, which should not avail the defendant.

*Best* then urged, that as the defendant conducted his cause in person, it was not necessary that his special plea should be signed by counsel.

But *the Court* held that the signature of a serjeant or counsel was nevertheless necessary, and

Discharged the rule with costs.

1811.

SAMUELS

v.

DUNNE

[ 387 ]

LEER v. YATES.

LEER v. COWELL.

Feb. 8.

LEER v. GORST.

THE plaintiff in each of these causes declared in *assumpsit*, complaining that the defendant had promised to take out of the plaintiff's ship, within a reasonable time after her arrival, certain brandy which the plaintiff had brought for him to *London*, but neglected so to do, whereby his vessel was detained. Another count alleged a promise of the defendant to take out the brandy within a reasonable time after notice to the defendant of the ship's arrival, and the third count was *indebitatus assumpsit* for the use of the ship *Mariana* of *Hamburg*, whereof the plaintiff was master, by the defendant retained and kept on demurrage with certain goods on board, for a long time, at the defendant's instance.

The defendants, *Yates* and *Gorst*, pleaded the general issue: the defendant *Cowell* paid into Court on the third count the sum of 16*l.*, upon a computation of the share which each of the several freighters who had put goods on board, must have contributed, in order to make up one sum of 4*l.* per day between them, if all had become liable to demurrage.

taken out till the upper tiers were cleared: held that each of the consignees was liable, on a general count for demurrage, to pay the 4*l.* per day for the 46 days.

A general ship took brandies on board, under bills of lading, which allowed 20 lay days for delivery of the goods in *London*, and stipulated for 4*l.* per day demurrage afterwards. Certain of the consignees chusing to have their goods bonded, the vessel could not make her delivery at the *London* docks until 46 days after the 20 days: some of the goods, which were undermost, could not, though demanded, be

Upon

1811.

LEER  
v.  
YATES.

Upon the trial of these causes, at *Guildhall*, at the sittings after *Trinity* term 1810, before *Mansfield*, C. J., it appeared, that the master of the vessel, which was a general ship, having a *British* licence, had taken on board at *Bordeaux* the goods consigned to the several defendants, and also goods for many other consignees, and had signed and delivered to each of the shippers a bill of lading, whereby he acknowledged "the shipping on board the *Mariana* of the goods," (describing them,) "to be taken out in twenty days after arrival or to pay four pounds per day demurrage:" the bill of lading limited the master's responsibility by containing the usual exception of "the act of God, the king's enemies, fire, all dangers of the seas, rivers, and navigation, save risk of boats, so far as ships are liable thereto." The *Mariana* arrived in the *London* docks on the 17th of *June*. If all the consignees would have paid the duty on their respective goods, the vessel might have been speedily discharged at other licensed wharfs, which were open for that purpose, but they all preferred bonding their brandy, and the quays and warehouses of the dock, at which alone bonded goods could be landed, were at that time so full, that there was not room to receive more goods to be bonded, in consequence of which, and of the number of vessels then waiting to discharge their cargoes, the vessel was detained until the first of *September*, before the other vessels which lay between the *Mariana* and the quay had been discharged, and before it came to her turn to be unloaded, and to have her cargo received into the warehouses. Eighty puncheons of brandy, which were delivered on that day, lay above the defendant's casks, and their goods, therefore, could not, in the ordinary course of delivering the ship, be taken out, until the eighty puncheons which lay above them were delivered, although with additional labour in moving the goods they might have been sooner taken out, under the inspection of the superintendant of the docks. It was in evidence that the defendant *Cowell* had frequently demanded a delivery of his goods, which was not complied with, the defendant saying it was impossible to get at the casks; and once, in particular, he had obtained an order from the dock company, permitting two casks to be landed upon payment of the duties, but the plaintiff, on application, said, he could not get at them on account of the superincumbent cargo. The defendant *Cowell* had executed a bond for the duties so early as the 22d *August*, and the plaintiff admitted that he, *Cowell*, had made every exertion

[ 389 ]

ion for landing the goods which depended upon his acts. It did not appear that the defendants *Yates* or *Gorst* had made any demand of their goods, nor had either of the three paid, or offered to pay the duties, without doing which, *Cowell's* order from the dock company, permitting the delivery, could not have been carried into effect. The jury in each case found a verdict for the plaintiff on the 3d count, with 184*l.* damages, being the amount of demurrage, at 4*l.* per day, for 46 days, the time which had elapsed from the 7th of *July*, when the 20 days allowed for delivery of the cargo expired, to the 7th of *September*, on which day the last of the defendant's casks were taken out. The judge reserved liberty for the defendants to move to reduce the verdict.

*Lens*, Serjt. in *Michaelmas* term 1810 obtained rules *nisi* to set aside these verdicts and enter nonsuits: he moved, upon the ground that a general claim for demurrage arises only in the case, where the delay, whether caused by the act of the defendant, or not, has been beneficial to, and occasioned in the service of the defendant. The delay which had arisen from the extent of the commerce of the country, co-operating with the law which restricted the place of delivery of these goods to the *London* docks only, was a misfortune, which fell with equal hardship on the plaintiff and on the defendant; but it did not render the defendant answerable to the plaintiff for the consequences.

*Shepherd* and *Best*, Serjts. in this term shewed cause. The plaintiff does not found this action upon any misfeasance or nonfeasance of the defendant. The bill of lading contains evidence of a contract to pay demurrage if the ship be detained beyond a certain number of days, from what cause soever that detention may arise, and of the rate at which that demurrage is to be compensated. There is nothing illegal in making such a contract, and the Court cannot inquire into the prudence or imprudence of it. It may be presumed that the plaintiff foresaw that his port was overloaded with imports, and therefore previously stipulated, that if his vessel was not discharged within a certain number of days, he should be paid for his further detention, whatever might be the cause of it. And as such a contract may exist, so there is no reason why the plaintiff may not under such a contract recover, on a general count for demurrage, upon the evidence of the bill of lading, in like manner, as in an action for goods sold and delivered, he may recover on the evidence of a contract for the sale of the goods at a particular price.

1811.

---

 LEER  
 v.  
 YATES.

[ 390 ]



1811.

LEER  
v.  
YATES.

[ 391 ]

price. Wherever a contract has been executed, the sum due on that contract may be recovered on a general count. As to the supposed unreasonableness of this contract, the number of persons who may chuse to enter into similar contracts with the defendant cannot affect the case; the compensation agreed to be paid by one, would not, alone, be sufficient to indemnify the plaintiff for the delay. It was in evidence that the expenses of the ship amounted to ten guineas a day, and only three of the consignees had incurred demurrage upon similar bills of lading, so that no very large profit resulted from the transaction; and since it was uncertain whether the plaintiff might obtain freight from more than one person, it was competent for him to form the like engagement with as many as offered. This is not a joint contract with the twenty consignors who may have goods on board this vessel, stipulating that they shall between them pay 4*l.* per day demurrage, and if it were, how could the sum be apportioned, when each takes out his goods on a different day? In the case of *Randall v. Lynch*, 2 *Camp. N. P.* 352. it was held that the necessary delay, occasioned by the crowded state of the *London* docks, did not excuse the freighter from paying demurrage for the ship's detention.

*Lens* and *Vaughan*, Serjts., in the two first of these cases, and *Cockell*, Serjt. in the last, *contra*. The plaintiff first attempted to charge the defendant upon the ground of a supposed default in him, but that ground failing, he resorts to the ground of mere detention, to which the defendant is no wise instrumental. The counts which aver a contract to take out the goods in a reasonable time, must be laid out of the question, since the evidence of the bill of lading specifies the time, 20 days. The importance of the subject to the commerce of this country is such, that the case of *Randall v. Lynch*, which was decided only at *nisi prius*, though it was the impression made on a very learned mind, deserves to be more fully considered. The words which are supposed to raise this obligation, are the language of the plaintiff, by him inserted in a bill of lading, which he delivers to the shipper abroad, a person probably ignorant of the state of circumstances here; how it came to be so inserted, does not appear: the bill of lading is not signed by the defendants, and it is as yet a new question, whether the acceptance of goods, accompanied with the delivery of a bill of lading will amount to a contract; and if it does, whether it be the effect of such a contract to raise this claim. The necessary in-

[ 392 ]

convenience now incident to every ship which enters the port of London, is equally notorious to both parties, but this agreement does not refer to that inconvenience, nor affect to obviate it. That burthen is therefore left, by this contract, where the law places it. It appears by the plaintiff's own instrument, that 4*l. per diem* is a sufficient compensation for the detention of the vessel. If twenty persons, then, have accepted such bills, it must be a *nudum pactum* as to all except the first. It was in evidence too, that no delay was occasioned by the defendants, but the delay arose from the 80 puncheons which lay above the defendants' goods; the latter could not have been gotten out, until the former were previously discharged, without extraordinary exertions, which exertions it belonged to the plaintiff to make: therefore, even if the law were as the plaintiff contends, the demurrage must be reduced from the 46 days, to the period which elapsed between the 1st of September, when the 80 superincumbent casks were removed, to the 7th, when the last of the defendants' goods were discharged: and as to the defendants Yates and Gorst, it was not attempted to shew on what day they could have been permitted by the officers of the dock to receive their goods, if they had been willing to pay duty for them instead of bonding them. It is urged that the defendants are liable for the whole delay, because they intended to bond the whole of their goods; but the plaintiff ought to have done that which he has not attempted, to have shewn how soon the whole could have been discharged if the defendants had been willing to pay duty for the whole; because from the expiration of that time only could the charge of laches rest with the defendants. But it is incumbent on the plaintiff to shew that he had done every thing which on his part was requisite towards the discharge of the ship, before he can urge any nonfeasance of the defendants, as a ground for charging them with this sum, for it is at least a concurrent, if not a precedent condition, that the plaintiff should place the goods in a situation ready for delivery; but here, if either of the defendants had paid the whole duties, his goods were in such a situation that he would have been unable to obtain them. The count, too, is for detaining the whole of the ship, whereas the evidence proves but the detention of a small part.

*Cur. adv. vult.*

MANSFIELD, C. J. on this day delivered the opinion of the Court.

It is impossible to decide these three very singular cases without being struck with the enormous gain which the owner may  
get

1811.

LEE  
v.  
YATES

[ 393 ]

1811.

LEER

v.

YATES.

get by this bill of lading; and which may possibly much exceed what in justice and conscience he ought to have. This is a general ship; thirty or forty persons may have goods on board, and for every one of them the owner may have his 4*l.* per day. It was said indeed, that in fact the 4*l.* per day for these three persons would not much exceed the fair charge for the demurrage of the whole ship: but it might have happened that many more persons might have become liable, and a much larger profit might have accrued. I was struck very much with the argument, that it was not the fault of the defendant, but the fault of the plaintiff himself, that these goods could not be got out till the other goods which lay above them were delivered. But it is not, in truth, the fault either of the plaintiff or defendant, that the goods could not be taken out. There can be only so many goods at the top of the vessel as the proper stowage of the goods will allow, therefore all the others must be at the bottom; and as this is a general ship, and the goods do not all belong to the same consignee, the goods of some of the consignees must be undermost. If this argument would avail; therefore, that the captain is not entitled to demurrage for those goods which were not uppermost, it would restrain the contract for demurrage to the few persons whose goods were at the top, but that construction would be contrary to the positive contract; for it is impossible to get out of the words of this bill of lading, which, though it is a singular species of contract, to bind a consignee by an instrument signed not by himself, but by the captain, yet as the consignors delivered the goods on board under that bill, and the defendants accepted that bill of lading, it is binding upon them, and therefore this action may be sustained on the general count for demurrage, and consequently the Rule must be discharged.

[ 394 ]

Feb. 8.

## MULLER v. GERNON.

An order of council permitting the consignee of goods coming from an enemy's country without a license, to land them here, on condition of immediately re-exporting them, does not so legalize the voyage, as to enable the master of the ship to recover his freight.

THIS was an action brought to recover the freight of certain brandies brought by the plaintiff from *Charente* to this country. Upon the trial of this cause at *Guildhall*, at the sittings after *Michaelmas* term 1810, before *Mansfield*, C. J., it appeared that the importation was intended to have been made under the sanction of a *British* licence, which was granted to the master of the ship to recover his freight.

the defendant by the King in council on the 2d of *December* 1808, to continue in force for six months, and which expired in *June* 1809. The plaintiff's vessel was detained in *France* by an embargo, which lasted two years, and he did not sail with this cargo, until *May* 1810: the cargo therefore became contraband; but the defendant, upon his petition to the privy council, was permitted to land the cargo, upon condition of immediately again exporting the same. The defence set up to the action, was, that the importation having become illegal, the plaintiff was not entitled to recover: he, however, contended, that the effect of the order in council, which permitted the defendant to land the goods here, was such as to continue the original licence in force down to the time of landing the goods; and that consequently, the voyage being legal, the plaintiff was entitled to recover his freight, and he accordingly obtained a verdict.

*Lens*, Serjt. had, on a former day in this term, obtained a rule *nisi* to set aside this verdict, and enter a nonsuit; against which

*Best*, Serjt. now endeavoured to shew cause, contending that as the defendant was now in actual possession of the cargo, it was not competent for him to set up so unrighteous a defence, and also arguing that the order of council could not legalize the landing of the goods here, without impliedly legalizing the voyage that brought them hither; he also referred to those cases in which a voyage continued after the expiration of a licence has been considered as legal.

*The Court*, stopping *Lens*, dismissed the last point from their consideration, because it had not been made at the trial, and held that, as to the principal question, there was nothing in it; the order of council did nothing more than give up the King's right of seizure of these goods, and had by no means the same effect as a continuation of the licence would have had. Freight was the reward which the law entitled a plaintiff to recover for bringing goods lawfully into the country upon a legal voyage, but the voyage here was clearly illegal, therefore he could recover nothing, and there must be a nonsuit.

Rule absolute.

1811.

MULLER  
v.  
GERNON.

[ 395 ]

1811.

Feb. 9.

PAYNE, Demandant; NATHANIEL, Tenant; HODGES, Vouchee.

Recovery amended by substituting a certain part of a parish which lay within a liberty, for the other part of the parish, which lay within a borough.

ON SLOW, Serjt. moved to amend a fine and recovery according to the deed to make a tenant to the *præcipe*, which bore date in 1766. The fine and recovery described the premises to be in the parish of *St. Margaret*, in the borough of *Leicester*, in the county of *Leicester*. The affidavit on which this motion was made stated, that the parish of *St. Margaret*, in the county of *Leicester*, was divided into two parts, one of which was situate within the borough of *Leicester*, and the other within a liberty called the *Bishop's Fee*, which was in the county, but not within the borough, and that the premises intended to be comprized in this fine and recovery lay in that part of the parish of *St. Margaret* which was within the *Bishop's Fee*, and not in that part which was within the borough of *Leicester*, and were so described in the deed.

The Court permitted the fine and recovery to be amended, by striking out the words, "in the borough of *Leicester*," and substituting the words "in that part of the parish of *St. Margaret* which lies in the *Bishop's Fee* in the county of *Leicester*."

[ 397 ]

Feb. 9.

CALLAGHAN v. AYLETT.

If a bill be accepted, payable at a banker's, it must be presented there for payment, and the neglect so to present it is equally a discharge to the acceptor as to the drawer.

THIS action was brought against the defendant as the acceptor of a bill of exchange, drawn by the plaintiff upon the defendant, at four months after date, for 68*l.* 4*s.* value received in feathers, payable to the plaintiff's order. The declaration averred that the defendant, on sight of the bill, accepted it "according to the usage and custom of merchants." There was also a count in the declaration for goods sold and delivered. Upon the trial of this cause at *Guildhall*, at the sittings after *Michaelmas* term 1810, the bill being produced, appeared to be accepted payable at Messrs. *Ramsbottoms*, bankers, *London*. Clayton, Serjt. for the defendant, made two objections to the plaintiff's right to recover: first, that there was a variance between the acceptance proved, which he said was an especial one, making the bill payable at a particular place only, and not elsewhere,

where, and the acceptance averred in the declaration, which was general; secondly, that there was no proof that the bill had been presented for payment at the place where by the acceptance it was made payable. The bill had been given for the price of goods sold and delivered; but the plaintiff's counsel, relying on the bill, gave no evidence of the sale of the goods. A verdict passed for the plaintiff, subject to the opinion of the Court upon these two objections, the judge reserving the points.

*Clayton* on a former day in this term obtained a rule *nisi* to set aside the verdict and enter a nonsuit, on the ground that it was necessary for the plaintiff to prove a presentment at the banker's where it was made payable: he moved this upon the authority of *Ambrose v. Hopwood*, 2 Taunt. 61.

*Marshall*, Serjt. now shewed cause. The case cited does not govern this case, for that was an action against the drawer, not against the acceptor, and the objection came by surprise on *Onslow*, Serjt.; but if it had been an action against the acceptor, the averment that the bill was duly presented to Messrs. *Freeman* would have been sufficient. [*Heath J.* There can be no difference in that respect between an action against the drawer and an action against the acceptor.] In *Saunderson v. Judge*, 2 H. Bl. 509., the drawer of a note, (who stands in the same predicament as the acceptor of a bill of exchange,) made it payable at the house of *Saunderson* and Co., his bankers; and it was urged that it ought to have been there presented for payment, and that it ought to have been averred that it was so presented; but the Court held that it was no part of the contract that the note should be paid at the house of *Saunderson* and Co., and that therefore that was not necessary to be stated in the declaration. [*Heath J.* In *Saunderson v. Judge*, it was a memorandum written by *Sharp* at the foot of the note, not a part of the instrument.] In 7 East, 385., *Parker v. Gordon*, it was indeed held, that if an acceptance makes a bill payable at a banker's, for the purpose of charging the drawer, it must be presented there within banking hours, for that the party taking such a special acceptance, impliedly agrees to present it where by the acceptance it is made payable. But in the case of *Lyon v. Sundius and Another*, 1 Campb. 423., the plaintiff, an indorsee, declared against the acceptor, generally averring an acceptance according to the usage and custom of merchants. The bill was accepted payable at Messrs. *Hankey* and Co.'s, London, and *Park*, for the defendant, objected that it ought to be declared on as a special acceptance; but Lord *Ellen-*

1811.

CALLAGHAN  
v.  
AYLETT.

[ 398 ]

1811. *borough*, C. J. said, "how can you make the words at *Hankey* and Co.'s more than a mere memorandum? The acceptor of a bill of exchange \* is liable universally. This very point was brought before the Court some time ago, when the Judges were all of opinion that such words formed no part of the contract, and did not require to be set out in the declaration." So (a), if a promissory note be made payable at a particular place, in an action against the maker, there is no necessity for proving that it was presented there for payment. *Per Bayley, J. Wild v. Rennards*, sittings in *Hil.* term 1809, 1 *Campb.* 425. n. The Court cannot hold with this objection without over-ruling all these late decisions of the Court of King's Bench. But supposing the plaintiff should not succeed on this ground, he is entitled to a new trial; for he was prepared to prove the sale of the goods, which were the consideration for the bill, under the count for goods sold and delivered.

*The Court*, stopping *Clayton*, who was prepared to support his rule, held, that doubtless there may be a qualified acceptance of a bill, which the holder is not bound to receive, but if he acquiesces in it, he must conform to the terms of it. As to the goods sold, the plaintiff exercised his judgment at the time of the trial, and relied on the point of law saved for him: if he had wished to avail himself of his consideration, he should have then proceeded to prove it.

Rule absolute to enter a nonsuit.

(a) But that in the case of promissory notes made payable at a particular place, it is necessary to aver a presentment and refusal at that place; see the case of *Bowes v. Howe*, in error, in the Exchequer Chamber, *June 25, Trinity* term 1815, post. vol. 5.

[ 400 ]

*Feb.* 11.

SMITH v. RUSSELL.

*Seem*, that a sheriff is not bound to find out what rent is due to a landlord and pay it him under 8 *Ann.* c. 14, unless the landlord gives him notice.

*ROUGH*, Serjt. had on a former day obtained a rule *nisi*, requiring the sheriff to pay over to Mr. *Isaac Pitcher*, the landlord of a house in which an execution had been levied, out of the proceeds of the execution, the amount of rent due to the lessor, not exceeding one year's rent; against which, *Best*, Serjt. now shewed cause. It appeared from the affidavits on the one

If goods remain on demised premises after a fictitious bill of sale made of them under an execution, they are liable to be distrained as before.

side

side and on the other, that the landlord never made any demand upon the sheriff for the rent, but that the wife of the defendant, whose family then resided in the house, apprized the plaintiff, who on the 7th of *December* purchased the goods under a bill of sale from the sheriff, and who on the 20th began to remove them, that on the 25th of *December* three quarters' rent would become due. The purchaser, however, persisted in removing them, and the landlord swore he believed it was done with intent to defeat his distress. It appeared, however, that the defendant's wife had at that time the bill of sale in her own custody, so that there was no doubt but that the sale was fraudulent.

*Best*, objected, first, that the goods had never been removed by the sheriff, but that when he had completed his duty they still remained on the premises liable to the distress: so that there was no ground for calling on the sheriff; secondly, that the landlord had given no notice to the sheriff that rent was due, which, he contended, was necessary. *Waring v. Dewberry*, 1 Str. 97. *Palgrave v. Windham*, 1 Str. 212. *Hankell v. Kempell*, 2 Wils. 140.

*Rough* contended that a fraudulent sale did not discharge the sheriff from the duty of retaining and paying over to the landlord the rent due. It was doubtful whether the officer were not bound to make inquiry whether any and what rent was due; but, at all events, if it by any means came to his knowledge that there was rent in arrear, he was bound first to satisfy the landlord. He endeavoured to distinguish this case from *Waring v. Dewberry*, *Palgrave v. Windham*, and *Cook v. Cook, Andrews*, 219. He also referred to *Darling v. Hill*, *Cas. temp. Hardwicke*, 255., and *Twells v. Colville, Willes*, 375.

*HEATH, J.* The sheriff cannot always find a landlord to inquire of. In this case, too, he does not remove the goods: there is no ground for making this rule absolute, nor is this a fraudulent removal within the stat. 8 *Ann. c. 14*. All the cases say, that the statute is made to protect the landlord from a fraudulent collusion between the plaintiff and defendant by means of an execution, and here the landlord is not prejudiced. I do not think the sheriff is bound to go and find the landlord and give him notice.

*LAWRENCE, J.* After this fictitious bill of sale the goods remained on the premises, and were liable to the landlord's distress, and he had nothing to do but to distrain them. I need not go into the question, whether the sheriff is bound to give notice

1811.

SMITH

v.

RUSSELL.

[ 401 ]



1811.

SMITH  
v.

RUSSELL

notice to the landlord, though in the case in *Strange* it seems that it was expressly held, that the landlord must give notice to the sheriff.

Rule discharged (a).

(a) *Mansfield*, C. J. was absent this day, in consequence of indisposition.

[ 402 ]

Feb. 12.

DOE, on the Demise of WHITFIELD, v. ROE.

The mortgagee of a lease has the same title to relief against an ejectment for non-payment of rent, and upon the same terms, as the lessee against whom the recovery is had.

**WHITFIELD**, by a lease dated 3d Nov. 1807, demised to *J. Cruwys* two messuages in *Sloane-street*, for the unexpired residue of a term of 20 years, at 52l. 10s.; and by indenture of 4th Jan. 1810, *Cruwys* assigned the lease to *Carden* for securing repayment of 150l. and interest, subject to a proviso for redemption upon repayment, which sum still remained due. Three quarters of a year's rent being in arrear, *Whitfield* distrained, and there not being sufficient effects on the premises, he served a declaration in ejectment on *Cruwys*, who was in possession, and in due course signed judgment against the casual ejector for want of a plea; and having had the premises delivered to him by the sheriff under a writ of possession, he demised them for 14 years to *Killick*, who had since expended a considerable sum in improving them. Under these circumstances, and upon an affidavit of *Carden* that he knew nothing of the ejectment until after the writ of possession was executed, the Court had, on a former day in this term, granted *Best*, Serjt. a rule *nisi*, that upon payment by the mortgagee to the lessor, of the rent arrear, and costs of the ejectment and of this application, the mortgagee might have the premises given up to him.

*Lens*, Serjt. now shewed cause against this rule. He contended that the statute 4 Geo. 2. c. 28. s. 2. had given the Court no jurisdiction to interfere in this case, more than it had before that statute, and that it could not relieve before then. At all events, if it had jurisdiction, it could only relieve upon the payment of all the lessor's costs and damages, which damages must include such damages as the lessor would become liable to pay to *Killick* in consequence of his ouster after expending much money in improvements of the premises.

*Best*, contra, cited *Downes v. Turner*, 1 Salk. 597., that before this statute the Court would relieve against an ejectment for non-payment

payment of rent, upon bringing all the rent into Court, accepting a new lease, and sealing a counterpart. *Goodtitle v. Holdfast*, 2 *Stra.* 900. *acc.*

The Court held that there was no distinction between lessee and mortgagee: if indeed the mortgagee's estate had become absolute, the mortgagee was actual tenant; and they made the Rule absolute (a).

1811.

DOZ,  
Lessee of  
WHITFIELD.  
v.  
ROE.

(a) *Mansfield*, C. J. was absent this day, in consequence of indisposition.

## NEESOM v. WHYTOCK.

Feb. 12.

*VAUGHAN*, Serjt. had obtained a rule *nisi* on the usual terms for setting aside an interlocutory judgment, upon an affidavit of merits made by *A. Mitchell*, clerk to the defendant's attorney.

*Best*, Serjt. shewed cause upon the ground that the deponent had not sworn that he was either the defendant's attorney, or managing clerk to the defendant's attorney.

The Court admitted that the objection was correct, and discharged the rule.

Any person other than the defendant making an affidavit of merits to set aside an interlocutory judgment, must either swear that he is the defendant's attorney's managing clerk, or the defendant's attorney.

## HAYNES v. JONES.

[ 404 ]

Feb. 12.

*VAUGHAN*, Serjt. moved to set aside the declaration and subsequent proceedings in this case for irregularity. On the 9th of *February* the defendant was served at *Colchester*, 52 miles from *London*, with the copy of a writ returnable on that day, being in eight days of the Purification; and at the same time he was served with notice, dated the same day, of a declaration being filed conditionally, and demand of a plea within eight days, otherwise judgment. *Vaughan* relied on the case of *Steward v. Lund*, 12 *East*, 116. that this was irregular.

But the Court, after reference to the officers, held, that a writ may be served on the same day on which it is returnable, and that a declaration may be filed upon the return-day of the writ. The ground of the defendant's complaint was, that he had more notice given him of the declaration than the plaintiff was compellable

A writ may be served on the day on which it is returnable, and notice of declaration may be given at the same time.

1811. pellable to give. The only effect of delivering the declaration and writ together, was that the plaintiff could not in that case charge the defendant for the declaration; and they rejected the application.

HAYNES  
v.  
JONES.

Rule refused.

*See Pope v. Turner.  
4th January 1818.  
The Declaration there was How can the Decisions be reconciled.  
in Chief*

Feb. 12.

Mayor, &c. of DONCASTER v. COE.

If the same special jurymen are struck to

[ 405 ]

try several causes on the same question, and the Court being dissatisfied with the verdict in the first, direct it to abide the event of another cause, they will also, on motion, discharge the same special jurymen from trying the second cause.

ACTIONS of trespass had been brought by the corporation of *Doncaster* against this and another defendant, to assert the exclusive property of the corporation to certain river-banks and other lands, which the defendants contended to be either of public right or subject to easements enjoyed by themselves individually. In both cases special juries were struck, consisting of the same persons, and one of the causes having been tried, the Court directed that the verdict should be set aside, and that the cause should abide the event of the trial of this cause, upon the ground that the jury had found a verdict contrary to the weight of the evidence (a).

*Cockell*, Serjt. had on a former day obtained a rule *nisi*, that the rule obtained for having a special jury in this cause might be discharged, and that this cause might be tried by the common panel.

*Clayton*, Serjt. now shewed cause. He contended, first, that no case had been cited to shew that the Court had jurisdiction to discharge the special jury: the statute was imperative, that the cause should be tried by the special jury once struck; the words were, "*shall be tried.*" Secondly, there had been no case shewn to require this extraordinary interposition.

*Rough*, Serjt., in the absence of *Cockell*, supported the rule. The Court have thought fit that another trial shall take place upon this question, and if the present cause, which is to bind the other, were to be tried by this special jury, it would be tried, though not before the same panel, yet by the same men, who came to so erroneous a conclusion in the former instance; such a trial would not answer the end which the Court proposed, in directing that cause to abide the event of the trial of this.

[ 406 ]

HEATH, J. It is a sufficient ground for this motion, that the same jurymen have tried a similar cause. The former part of

(a) See *Mayor of Doncaster v. Day*, ante, 362.

this

this rule, so far as relates to discharging the special jury, must be made absolute; the latter part need not be granted.

LAWRENCE, J. As to the question of jurisdiction, suppose there were corruption in the jury, hath not the Court authority to discharge them? for the argument goes to that length. There is no need of citing authorities; the same persons have tried this question in another cause: that circumstance must necessarily create in them a bias.

Rule absolute to discharge the rule for the special jury.

1811.

Mayor of  
DONCASTER  
v.  
COE.

---

SPITTA v. WOODMAN.

Feb. 12.

**SHEPHERD**, Serjt. moved that the prothonotary might review his taxation of costs; a verdict had been found for the plaintiff as for a total loss; and a motion was made in the next term, (*ante*, vol. 2. p. 416.) for a rule *nisi* to set aside the verdict and enter a nonsuit. The Court held, upon the discussion of that rule, that the plaintiff was not entitled as for a total loss, but that he was entitled to a return of premium. Upon the taxation of costs, the prothonotary did not think himself at liberty to allow the plaintiff the costs of that motion, the Court not having said any thing about costs. On a similar motion to this in the Court of King's Bench, the Court allowed the costs on this sort of motion (*a*). *Routh v. Thompson*. There, a special case was reserved, to try whether the plaintiff was entitled as for a total loss; and if not, whether he was entitled to recover as for a return of premium. The defendant had not paid the premium into Court. The Court held, that he was not entitled to recover a total loss, but that he was entitled to a return of premium; and nothing was said about costs. The master of the King's Bench did not allow any costs, except those of the count for money had and received, and such parts of the briefs and evidence as apply to it; but the Court of King's Bench directed the master to review his taxation. In this case, as in that, although the defendant was entitled to some relief, he made an improper motion, and compelled the plaintiff to come hither to resist the excess of his motion, for he moved for a nonsuit, whereas he should have moved to reduce the damages.

If the plaintiff recover a verdict for a loss on a policy, and endeavour, on a rule *nisi* being obtained for a nonsuit, to support his verdict to the extent, although he be held entitled to a return of premium, he is not entitled to the costs of the rule. Nor to any costs, except of

[ 407 ]

the count for money had and received, and of such parts of the brief and evidence as apply thereto.

(a) This case, but not this point, is reported 11 *East*, 428.

HEATH,

1811.

SPITTA

v.

WOODMAN.

HEATH, J. In *pari conditione*, neither party must pay costs. There must be no costs on either side; the prothonotary has done very rightly.

LAWRENCE, J. The plaintiff did not confine his resistance to the rule, to a mere assertion of his claim to recover the premium. He was squabbling for more.

Rule refused.

[ 408 ]

Feb. 12.

TENNYSON, Demandant; GOULTON, Tenant; ROUSBY, Vouchee.

A recovery 98 years old, amended by inserting a manor and tithes, without affidavit of intention that they should pass, the intention being manifest from the deeds, and the possession having gone accordingly.

Though there was no other evidence of the existence of a manor, than the mention of it in an old deed, and the appointment of a gamekeeper.

LENS, Serjt. moved to amend a recovery suffered in Hilary term, 1 Geo. 1. of lands in Sledmere in the county of York, by inserting the words "*manerium de Croome cum pertinentiis*," before the words, "*duo messuagia*," &c., and by also adding the words, "*necnon omnes et omnimodas decimas garbarum, bladorum, granorum, et fœni, et omnes alias decimas quascunque, annuatim et de tempore in tempus provenientes, vel renovantes, de, ex, et infra manerium et villam, sive hamlettum, de Croome predictum, decimis lanæ et agnorum solummodo exceptis*," after the word *Sledmere*, in the record of the recovery, the exemplification thereof, and all the several entries and process to perfect the same, upon payment of the additional fine, if any, at the alienation office, and all usual and customary fees at the same, and the several other offices. He moved this upon a statement, that the family of *Rousby* had purchased this estate in 1672, and that by a deed made 24th April 1683, all the estate and hereditaments, (which last word would carry tithes in a deed,) of the then possessor of the name of *Rousby*, within the hamlet of *Croome*, had been limited in tail; and it was objected by a late purchaser, that that entail still subsisted as to this manor and tithes, unless the recovery suffered in 1714 were amended. At this distance of time, it was not possible, he said, to have the usual affidavit of the intention of the parties, but it was held in the case of *Gladwyn v. Brown*, ante 2. 1. that such affidavit was unnecessary where the distance of time was so great. The deed to make a tenant to the *precipe* for the recovery suffered in 1714, after enumerating the lands, conveyed to the re-lessee, "all other the lands, tenements, and hereditaments of *H. Rousby*, lying and being within the townships, precincts, and territories of

[ 409 ]

“ of *Croome* and *Sledmere*, or either of them, or elsewhere, together with all and singular other the houses,” &c. He also produced the affidavit of *S. Vines*, a devisee in trust to sell under the will of *H. E. Rousby* deceased, and for six years a receiver of the rents of the estate under a decree of the Court of Chancery, which stated, that the deponent was well acquainted with the testator's estates, and that they were situate in the hamlet of *Croome* in the parish of *Sledmere*, in the county of *York*, and that they consisted of, amongst other things enumerated, the manor or reputed manor of *Croome*, together with the tithes of the whole of the hamlet of *Croome*, with the exception of the tithes of wool and lamb within the same, which were claimed by the impropiator of the rectory of *Sledmere*. That the manor of *Croome* was described in the indenture of 24th. April 1683, as “the manor or reputed manor or lordship of “*Croome*,” but that there were no freehold or copyhold tenants, and therefore the only fruit of the seignory had for many years been the appointment of a gamekeeper, which had been exercised without question; that the tenants of the estate, some of whom had been 60 years in possession, had dealt with the deponent for a renewal of their expiring leases upon a representation made by them, that the tithes of their respective farms, which were commensurate with the hamlet of *Croome*, except the tithe of wool and lamb, belonging to the impropiator of *Sledmere*, did belong to the proprietor of the estate, and were in no wise to be accounted for by the occupiers.

The Court permitted the amendment.

1811.

TENNYSON  
and Others.

---

SAUVAGE v. DUPUIS (a).

[ 410 ]

Feb. 12.

**ASSUMPSIT.** The plaintiff declared that he was possessed of a messuage for the residue of a term, which expired at Lady-day 1810, as tenant to *J. H.* under an indenture of lease, by which the plaintiff covenanted to repair during the term, and once in every three years thereof to paint the parts usually painted, and peaceably to surrender at the end of the term the premises so repaired and painted, together with the fixtures,

years and one quarter, and quitted. Ruled, that though perhaps he might have notice at the end of three years, yet the remaining longer implied a contract for the residue of the term.

(a) *Mansfield*, C. J. was absent this day, owing to indisposition.

The defendant agreed by parol to rent a house, as tenant from year to year, for the residue of a term, which was three years and three quarters: he held for three quarters without paying rent for

and

1811.  
 SAUVAGE  
 v.  
 DUPUIS.

[ 411 ]

and thereupon, upon the 26th of *June* 1806, in consideration that the plaintiff would demise the premises to the defendant, to hold of the plaintiff, during the term of one year from *Midsummer-day* then last past, and so on, from year to year, until the expiration of the term, the defendant undertook during such tenancy to perform all the covenants on the tenant's part contained in the lease, and avers that he demised to the defendant accordingly; but that the defendant did not repair, paint, or quietly surrender the premises repaired and painted, with the fixtures. There was another count upon a promise by the defendant to repair in consideration of his tenancy, and a count for use and occupation. Upon the trial of this cause at the *Middlesex* sittings after the last *Michaelmas* term, before *Mansfield*, C. J., it was proved that the plaintiff was possessed of a lease, as stated in the declaration, for a term of 7 years, commencing from the 25th of *March* 1803, which he proposed to assign to the defendant, as from *Midsummer* 1806, who, upon the faith thereof, in *July* 1806, entered; but after he was in possession, it appeared that there was a covenant in the lease restrictive of alienation, and the lessor, on application, refusing licence to assign, the defendant continued in possession, without any written contract, under a parol agreement, that "he should hold as tenant from year to year, during the residue of the term." The defendant paid rent from time to time, and a little before *Lady-day* 1809 gave notice of his intention to quit the premises at the ensuing *Michaelmas*, and accordingly quitted the premises a week before *Michaelmas* 1809. The plaintiff, by a particular delivered, claimed a sum for dilapidations, and the rent to *Lady-day* 1810. *Best*, Serjt. for the plaintiff, contended, that the defendant, having entered and occupied, must be taken to hold on the terms on which he would have held, if the first contract had been effectuated, and the lease assigned, in which case his tenancy would have terminated at *Lady-day*, and this being contract executed, might be enforced without regard to the statute of frauds. *Shepherd*, Serjt., *contra*, contended that the contract, as stated in the declaration, was repugnant, for if he held from year to year, he could not hold for three years and three quarters certain, nor could a holding from year to year, which commenced at *Midsummer*, terminate at *Lady-day*: and a parol contract for a term of three years and three quarters was void by the statute of frauds. *Mansfield*, C. J. thought the defendant was tenant from year to year, commencing from *Midsummer*

*summer* 1806, but that he could not under such a tenancy hold the premises for the fourth year, because that would endure to *Midsummer* 1810, whereas the interest of all parties expired at *Lady-day* 1810. The notice to quit at *Michaelmas* 1809 was ineffectual, in any view that could be taken of the contract; and as there was no proof of any want of repairs, he nonsuited the plaintiff, with liberty to move to enter a verdict for 21*l.*, the half-year's rent computed to *Lady-day* 1810, if the Court should be of opinion that the plaintiff was entitled to recover it.

*Best* having accordingly obtained a rule *nisi*.

*Shepherd* and *Vaughan*, Serjts. shewed cause. The contract being by parol, was not good as an assignment of the residue of the term, for an assignment must, now, be in writing; it was not good as a lease, because it was for a greater term than three years, and a contract of demise for a greater term than the statute of frauds authorizes, cannot enure for three years, parcel of the term, and be void for the residue. It therefore created only a tenancy from year to year, which must be for entire years, and not for fractional parts of a year. The contract is not merely for a tenancy from year to year, but for a tenancy from year to year during the residue of the plaintiff's term. There must be some meaning given to those last words: they are not merely insensible. The true construction is, that this, like other tenancies from year to year, should be determinable at the end of any one year, if half a year's previous notice were given by either party; but that, although no such notice were given, it should determine of itself so soon as the estate of the plaintiff, not having another integral year remaining thereof, ceased to furnish materials for the longer duration of the tenancy from year to year. This tenancy, therefore, expired at the end of the three years; and the defendant was free then to quit the premises: he continued, however, another quarter, during which he was a mere tenant at sufferance, an estate which was determined by his removing from the premises, and which required no previous notice to determine it. It is contended that this was a contract to let the premises to the defendant so long as the plaintiff's interest therein lasted: but as that contract would not be binding on the plaintiff, because of the statute of frauds, so neither is it binding on the defendant. This differs much from the usual case, where a man occupying a house for half a year, becomes liable for a year's rent, under an inference, which the law gives, of a contract for a whole year; here the parties could

1811.

SAUVAGE  
v.  
DUPUIS.

[ 412 ]

[ 413 ]



1811.  
 ———  
 SAUVAGE  
*v.*  
 DUPUIS.

could not, even by express words, have contracted for another year, for there was not a year remaining, and when no longer a year remained, a year's tenancy could not be implied.

*Best* would have supported his rule.

HEATH, J. We are all of opinion, that as this was a letting from year to year, the tenant having continued to hold after the three years, must be considered as continuing to hold on the same conditions for the residue of the term.

LAWRENCE, J. At the *Christmas* before the defendant went out, he might have given notice of his intention to quit at the *Midsummer* then following; and then there would have remained nine months for the landlord: or, possibly, at the end of the three years, though he had given no notice, he might have been at liberty to quit: but he does not do that; he holds for three months more, and I think it may therefore be implied that he contracted to hold for the residue of the term, upon the same conditions upon which he had held from year to year.

[ 414 ] CHAMBER, J. I do not know but that the defendant might have held from year to year for the three years, and quitted at the end of them without notice; but here, having commenced his tenancy of the remaining period, it must be taken that he held for that period on the same terms as before, so far as they were applicable.

Rule absolute.

END OF HILARY TERM.

(IN

## (IN THE HOUSE OF LORDS.)

1811.

HUFFAM and Another v. ELLIS. In Error.

April 10.

**A**SSUMPSIT, brought by original, in the Court of King's Bench, by the defendant in error, against the plaintiffs in error, as the drawers and indorsers of a bill of exchange. The declaration stated that the plaintiffs in error made their certain bill of exchange in writing, and directed the same to one Mr. *Wm. Robertson*, merchant, *Great St. Helens*, and thereby required him three months after date, to pay to them or their order 426*l.* 16*s.*, which bill the said *William Robertson* afterwards, according to the usage and custom of merchants, on sight thereof, accepted, and expressed the same to be payable at the house of certain persons using the names, style, and firm of *Kensington, Styant, and Adams*: and after averring an indorsement to *Godin Shiffer and Ellis*, and a second indorsement by them to the defendant in error, it was averred, that afterwards, and when the bill became due, (to wit) on the 4th day of *August* 1810, the said bill was shewn and presented to the persons so using the names, style, and firm of *Kensington, Styant, and Adams*, for payment thereof, according to the tenor and effect of the said bill, and the said *William Robertson's* acceptance thereof, and the several indorsements so made thereon; but as well the said last-mentioned persons, as the said *William Robertson*, then and there refused and neglected to pay the same. To this declaration the plaintiffs in error pleaded a sham plea of a judgment recovered in the Court of Common Pleas, to which the defendant below replied, and in *Hilary* term last obtained judgment upon failure of the record; and the plaintiffs in error assigned for error, that the bill was not averred to have been presented for payment at the place where the same was in and by the said acceptance made payable, but was only alleged to have been presented to those persons for payment; and stated the following reasons in favour of the reversal.

An averment that a bill, accepted payable at a banker's, was, when due, presented to the bankers for payment, according to the tenor and effect of the bill, and of the acceptor's acceptance thereof, and that as well the bankers as the acceptor refused payment, shall be supported after judgment on a sham plea.

And it shall be intended that the bill was presented for payment to the acceptor himself at the house of those persons. *Semble.*

For evidence of those facts would be admissible under such an allegation, and not repugnant to it.

[ 416 ]

1st. Because the drawer, or indorser, of a bill of exchange, is not liable to be sued upon it, unless it be duly presented for payment

1811.

HUFFAM  
and Another  
v.  
ELLIS;  
In Error.

payment to the acceptor at the place by him appointed for the payment thereof; and such presentment must be shewn in a declaration against the drawer. *Ambrose v. Hopwood*, 2 Taunt. 61. 2d. Because, by the declaration it appears, that the bill was neither presented to the acceptor, nor at the place appointed for its payment, but was presented to certain other persons, who were strangers to it. 3d. Because the loose and general words, "according to the tenor and effect of the said bill of exchange, and of the said *W. Robertson's* acceptance thereof, and of the said several indorsements so made thereon "as aforesaid," which are found in this declaration, can be of no avail. They are repugnant to the previous special allegation, in which the manner of the presentment is precisely shewn; and by which it appears, that the bill was not presented according to the tenor and effect of the acceptance.

C. Abbott.

The defendant in error joined in error, and prayed that the judgment given by the Court of King's Bench might be affirmed for the following, among other, reasons :

1st. Because the declaration and the matters therein contained are sufficient in law, under the foregoing circumstances, for the plaintiff below to have and maintain his aforesaid action against the said defendants below. 2d. Because the declaration avers, that the bill of exchange in question was shewn and presented to the persons using the style and firm of *Kensington, Styan, and Adams*, for payment thereof, according to the tenor and effect of the said bill, and the said *William Robertson's* acceptance thereof, which averment to be true in fact, as laid, must of necessity imply that such bill of exchange was presented for payment where by the tenor of the acceptance made payable, and is equivalent to a direct averment thereof in terms. 3d. Because, if the defendants below intended to dispute the fact of the said bill being presented according to the tenor and effect thereof and of the said acceptance, they ought to have put it in issue below, and cannot set up the same after judgment; and that by the course they then thought proper to take, it is evident their object was, and is, delay, and nothing else.

Giffin Wilson.

The case was argued on this day, and the authorities of *Ambrose v. Hopwood*, *Rushton v. Aspinall*, Doug. 654. *Parker v. Gordon*, 7 East, 385. were referred to.

The

[ 417 ]

*The Court* ordered and adjudged that the judgment of the Court of King's Bench should be affirmed.

1811.

HUFFAM  
and Another  
v.  
ELLIS;  
In Error.

*Note.* The reporter was not present at the decision of this case. But Lord *Erskine* is said to have expressed himself, that if there had been no such averment as could have led to proof of the due presentment, the declaration would have been bad; but it must be apparent, that upon that allegation, due presentment might have been proved. It would be dangerous to allow such subtleties to prevail. Lord *Eldon*, Chancellor, is reported to have said, The more the counsel for the plaintiff in error satisfies me that a presentment at the place where the bill was made payable, was necessary, the more he satisfies me that I must intend by this allegation, that such a presentment was made. See the case of *Bowes v. Howe*, in the *Exchequer-chamber*, in error, *Trinity term*, 1813, *post*, vol. 5.

1811.

ARGUED AND DETERMINED

IN THE

COURTS OF COMMON PLEAS,

AND

EXCHEQUER-CHAMBER,

IN

Easter Term,

In the Fifty-first Year of the Reign of GEORGE III.

May 3.

ANONYMOUS.

The Court refused to amend a recovery by changing the county, the premises lying in a parish which ran into two counties, and lying wholly in the county omitted, and no part in the county

[ 419 ]  
mentioned.

*VAUGHAN*, Serjt. moved to amend a recovery suffered more than 60 years since of lands described in the deed declaring the uses, as lying in the parish of *Appleby*, and described in the recovery to lie in the county of *Derby*, by striking out the words county of *Derby*, and substituting the county of *Leicester*, upon an affidavit that the parish of *Appleby* lies partly in the county of *Derby*, and partly in the county of *Leicester*, and that the premises were wholly situate in that part of the parish of *Appleby* which lay in the county of *Leicester*, and no part of them in that part of the parish which lay in the county of *Derby*. Only one recovery had been suffered of them, not one in each county.

*The Court* held that there must be a new recovery: it was impossible to change the recovery from one county to another, and

Refused the application (a).

(a) See *Wainwright*, Demandant; *Seagrave*, Tenant; *Smyth*, Vouchee; ante. i. 538. *Idco quere* of the case of *Rashleigh*, Demandant; *Lee*, Tenant; *Smith*, Vouchee; *Trinity* term 1813, post, vol. 5., where the Court amended by changing the county.

VIOLETT

1811.

May 4.

## VIOLETT v. ALLNUTT.

his action, the plaintiff declared upon a policy of insurance, at and from *Plymouth* to *Malta*, with liberty to touch *Penzance*, or any port in the Channel to the westward, for any purpose whatever, upon goods by the ship *Lion*, beginning her adventure from the loading thereof on board the said ship. The plaintiff averred that the ship was in good safety at *Plymouth*, bound upon the said voyage, and that divers goods of great value were there loaded on board her: and that afterwards the ship, with the said goods on board, sailed from *Plymouth* on her intended voyage, and in the course thereof proceeded to and touched at *Penzance*, for the purpose of loading and unloading in there other goods and merchandises for *Malta*; but whilst she was there, other goods of great value were, to wit, at *Penzance*, loaded on board the said ship, to be carried therein from thence to *Malta*, and that the plaintiff was interested in the goods. That in the course of the voyage the ship was stranded and upset, and the plaintiff not only sustained a loss upon his goods to the amount of 40l. per cent., but a general average loss also accrued upon the ship, her freight, cargo, and the plaintiff in respect of his said several goods was liable to, and did contribute to such general average loss, to the amount of 30l. per cent. more on the value of such goods, and averred the defendant's liability, notice and refusal to pay. The cause was tried upon admissions at the sittings after *Hilary* 1811, before *Lawrence*, J. The only material facts were, that the plaintiff, intending to ship goods on the voyage insured, to the amount of 3190l. 14s., caused insurances to be effected for the sum: that the goods loaded on board the *Lion* at *Plymouth* amounted, including charges, to 1880l. 6s.: that the ship proceeded from *Plymouth* to *Penzance* for the purpose of completing her loading, and there received on board, on account of the plaintiff, the remainder of her cargo, consisting of 651 hogsheads of pressed pilchards, amounting, including charges, to 2l. 8s. That while the ship was lying at *St. Michael's Mount*, at *Penzance*, waiting for a favourable wind to proceed on her voyage, she was stranded, and the cargo received damage, for which a general and a particular average was incurred. That the general average, and the particular average, upon the goods loaded in at *Plymouth*, amounted together to the sum of 23l. 8s. 6d.

Liberty to touch at a port for any purpose whatever, includes liberty to touch for the purpose of taking on board part of the goods insured.

[ 420 ]

1811.  
 ———  
 VIOLETT  
 v.  
 ALLNUTT.

[ 421 ]

per cent., which the defendant had paid into Court, and the particular average on the goods loaded at *Penzance* amounted to 19*l.* 12*s.* 4*d.* per cent., which the defendant contended he was not liable to pay by the terms of the policy in question. It was agreed that the only question to be tried was, whether the defendant was liable for the loss on the goods taken on board at *Penzance*; and that in case a verdict should be found for the plaintiff, the same should be entered for 36*l.* 4*s.* 8*d.*, being the remainder of the sum claimed in this action. The jury having found a verdict for the plaintiff,

*Lens*, Serjt. on this day moved to set it aside, upon the ground that the permission to touch at *Penzance* did not include the touching there for the purpose of taking in a further cargo, and that, by the terms of the policy, the insurance attached only on the cargo to be loaded at *Plymouth*.

But the Court held there was no ground for the objection, and

Refused the rule.

May 4.

### HORWOOD v. HEFFER.

No ill treatment by the husband of the wife, short of personal violence, or such as to induce a reasonable fear of it, will enable a stranger to maintain *assumpsit* against her husband for necessaries furnished to her subsequently to her leaving his house.

[ 422 ]

THIS was an action of *assumpsit* against the husband for board, lodging, and necessaries furnished to the defendant's wife. Upon the trial of this cause at *Westminster*, at the sittings after *Hilary* term 1811, before *Lawrence*, J., the plaintiff was nonsuited on his opening by the learned Judge, without going into the evidence, the facts alleged being, that the defendant had treated his wife with great cruelty; had taken another woman into the house, with whom he cohabited; that he had confined his wife in her chamber under a pretence of insanity; and that she had escaped; and the present action was brought for the value of necessaries furnished to her after her departure. *Best* contended at the trial, that this treatment was equivalent to turning the wife out of doors; and he cited *Hodges v. Hodges*, 1 *Esp. N. P. C.* 441., in which Lord *Kenyon*, C. J. held that ill-treatment which rendered the wife's stay unsafe, was equivalent to turning her out of doors.

*Best* now moved to set aside the nonsuit, and have a new trial.

LAWRENCE,

LAWRENCE, J. You did not state any apprehension of her personal safety; you principally dwelt on the circumstance of the defendant's having placed a profligate woman at the head of his table, and having told the wife, that if she did not like to dine there, she might dine in her own chamber. I thought, that, however improper that conduct might be, and however abhorrent from the feelings of a delicate woman, she might nevertheless have had necessaries, if she had staid there. She might, if she had thought fit, have sued for alimony, and a divorce *a mensâ et thoro*.

MANSFIELD, C. J. If this suit were maintainable, it would be necessary that the jury should, in the first place, determine whether the wife lawfully left her home or not; this would wholly supersede the necessity of a suit for alimony, or a divorce *a mensâ et thoro*. I think nothing short of actual terror and violence will support this action.

Rule refused,

1811.

HORWOOD  
v.  
HEFFER.

---

JACOBS v. NELSON.

[ 423 ]

May 4.

THE plaintiff declared that in consideration that he had caused to be delivered to the defendant a crate of glass of great value, viz. of the value of 10*l.*, to be carried by the defendant from *London* to *Rayleigh*, and there to be delivered to one *Charles Bryan*, to be paid for on delivery, for certain reasonable hire or reward to the defendant, the defendant undertook to carry and deliver the goods, and receive the money for them on delivery; and assigned for breach, that though the defendant did carry the goods, she did not receive the money for the plaintiff. After verdict for the plaintiff,

An averment of an undertaking to carry goods to *R.* to be delivered to *C. B.*, to be paid for on delivery, shews with sufficient certainty that the price of the goods was to be paid by *C. B.*, the consignee, to the carrier.

*Shepherd*, Serjt. now moved in arrest of judgment, upon the ground that it did not appear what price the defendant was to receive for the goods, nor by whom it was to be paid.

The Court held it was sufficiently intelligible that the person to whom the goods were to be delivered was to discharge the price of them, and

Refused the Rule.

CATES



1811.

May 4.

## CATES v. HARDACRE.

A witness may object to answer a question which he thinks will tend to his crimination, though the answer would not lead to an immediate conclusion of guilt.

THIS was an action by an indorsee against the drawer of a bill, drawn, payable to the drawer's order, upon *Stratton*, and by him accepted and afterwards dishonoured; it was stated in the declaration to have been indorsed by the defendant to the plaintiff. The case was tried before *Heath, J.* at *Westminster*, at the sittings after last *Hilary* term. The plaintiff proved his case. The defence intended to be set up was usury. The first witness called on the part of the defendant was one *Taylor*, and the bill having been put into his hands, he was asked by *Shepherd, Serjt.* for the defendant, "whether that bill had ever been in his possession before;" upon which *Best, Serjt.* interfered, by asking the witness whether he had not been indicted for usury in this transaction, and upon his answering in the affirmative, *Best* cautioned him against answering questions which might tend to criminate him; the witness said that he thought his answer to the question proposed would have a tendency to convict him of the offence of usury; the learned Judge told him that if he thought so, he was not bound to answer the question: the witness availed himself of this direction, and the counsel for the defendant being thus prevented from pursuing his inquiry, a verdict passed for the plaintiff.

On this day *Shepherd, Serjt.* moved for a new trial, contending that the Judge's direction was wrong; that it was not sufficient that a witness thought that his answers would tend to criminate him; but that it ought clearly to appear that they would have that effect.

[ 425 ] MANSFIELD, C. J. Your questions go to connect the witness with the bill, and they may be links in a chain.

Rule refused.

May 4.

## PYEWELL v. STOW.

A person may assist bail in taking, and may lawfully detain the principal, although the bail do not continue present.

THIS was an action of trespass and false imprisonment. The defendant pleaded that *Wilson* had brought an action against the plaintiff, and that *Williams* became his bail to that action, at whose request the defendant gently laid hands on the plaintiff, to assist *Williams* in taking him, and kept him a reasonable time, and discharged him. The plaintiff replied, that although

although true it was, that *Williams* had become such bail, the defendant of his own wrong imprisoned the plaintiff. Upon the trial before *Graham, B.* at the spring assizes 1811, on the *Oxford* circuit, the evidence was, that *Williams* pointed out the plaintiff to the defendant, while the plaintiff, who had become a bankrupt, was attending before the commissioners; that the defendant took him and carried him to a public-house, and there detained him, in expectation of receiving directions from *Williams*, (who had gone away and left them together) what was to be done with him, but after a considerable time receiving none, he further detained him until he paid the defendant five shillings, and then discharged him. Upon this evidence the plaintiff was nonsuited.

1811.

—  
 PYEWELL  
 v.  
 STOW.

*Shepherd, Serjt.* now moved to set aside the nonsuit, upon the ground that, supposing the defendant to be well authorized by *Williams* to take and keep the plaintiff, yet when *Williams* went away, the defendant had no longer authority to detain him.

[ 426 ]

*MANSFIELD, C. J.* The plaintiff ought to have newly assigned.

*LAWRENCE, J.* Surely it is not necessary that the bail should constantly continue in the presence of the principal, in order to justify the detaining him by another. If he relied on the excess, he should have stated in his replication, that after the bail had discharged him, the defendant detained him until he paid the five shillings.

Rule refused.

PROSSER, Clerk, v. GORINGE.

May 4.

**T**HIS was an action of trover for tithes, which came on to be tried at the *Lewes* summer assizes 1810, before Lord *Ellenborough, C. J.*, upon whose suggestion the cause was referred to a gentleman at the bar, under the following order, the Reverend *Thomas Poole Hooper*, clerk, rector of *Kingston Bowsay*, in the county of *Sussex*, consenting to be made a party thereto, and to be bound by the reference and award thereby directed, it was ordered, by and with the consent of the parties, and to settle all matters in difference between them, and to determine what he should think fit to be done by either of the parties, touching the matters in dispute. Held, that he did not exceed his power by awarding undivided moieties of the tithes to the two rectors.

An arbitrator to whom the question of the right of two rectors to the tithe of certain lands, was referred, had power to devise all means to prevent future litigation between the parties.

heir

1811.  
 PROSSER  
 v.  
 GORINGE.

[ 427 ]

their counsel and attornies, that a verdict should be entered for the plaintiff, damages 500*l.*, costs 40*s.*, subject to the award of the arbitrator, who was thereby empowered to direct that a verdict should be entered for the plaintiff or the defendant as he should think proper, and to whom it was thereby referred, to ascertain what lands were severally titheable to the rectors of *Southwick* and *Kingston Bowsey*, and what description of tithe was due to each in respect of the farm lately occupied by *Colville Bridger*, to devise all means to prevent future litigation between the parties to that order, or between any or either of them during the joint incumbencies of the plaintiff as rector of *Southwick*, and *T. P. Hooper*, as rector of *Kingston Bowsey*, and generally to settle all matters in difference between the parties to that order, any, or either of them, and to order and determine what he should think fit to be done by either of them respecting the matters in dispute, who agreed to be bound and concluded by such determination, and to remain contented and satisfied therewith. The arbitrator awarded that a verdict should be entered for the defendant, and further, that it having then become impossible, touching the matters referred, to ascertain and distinguish the particular parcels of land, to the tithes of which the rectors of *Southwick* and *Kingston Bowsey* were respectively intitled, he awarded that one fourth part of all the great and small tithes growing due from the farm lately occupied by *Colville Bridger*, was the right and property of *T. P. Hooper*, rector of *Kingston Bowsey*, and that the remaining three fourth parts of such tithes were the right and property of the plaintiff, rector of *Southwick*. And he further awarded, that one fourth part of all the great and small tithes growing due from such part of the west side of *Southwick* as formerly lay in tenantry, or was the sheep down, adjoining to, though not being part of, the farm lately occupied by *Colville Bridger*, was likewise the right and property of *T. P. Hooper*, rector of *Kingston Bowsey*; and that the remaining three fourth parts of such last mentioned tithes were the right and property of the plaintiff, rector of *Southwick*.

[ 428 ]

*Best*, Serjt. had on a former day obtained a rule nisi on behalf of the plaintiff, for setting aside this award. It appeared by the affidavits sworn on the part of the defendants, that the *Lewes* summer assizes 1802, two causes came on to be tried before Lord *Kenyon*, C. J., the one being an action brought by the plaintiff against *John Norton*, Esq., the lessee of

Reverend

**Reverend Charles Williams**, the then rector of *Kingston Bowsey*, for the tithes of the lands called *Southwick West Laines* and the *Down* belonging thereto, lying on the west side of *Southwick*, due in the year 1798, and the other against the present defendant, as lessee of *Charles Williams*, for the tithes of the same lands for the year 1799, and upon that occasion those causes were, (with the consent of *C. Williams*, who was made a party to the order,) referred to the award of a learned Serjeant, to settle all matters in difference between the parties; upon which occasion oral and written testimony, to the effect given before the present arbitrator, was given, and whereupon the then arbitrator awarded that *C. Williams*, as rector of the rectory of *Kingston by Sea*, was legally and justly entitled to take and receive tithes, as well great as small, yearly or otherwise arising, growing, and accruing from part and parcel of the lands commonly called *Southwick West Laines*, and the *Down* belonging thereto, lying on the west side of *Southwick*; and although from the evidence produced before him on that reference, he could not, consistently with justice, ascertain, specify, or describe out of what lands in particular, as part and parcel of the lands called *Southwick West Laines* and the *Down* belonging thereto, the tithes to which *C. Williams*, as such rector, was entitled, did arise or accrue, yet, as to the whole of the tithes arising therefrom, the arbitrator did award, that *C. Williams*, as rector of the rectory of *Kingston by Sea*, was legally and justly entitled to take and receive one fourth part or share of the tithes, but no more, and that the plaintiff, as rector of the rectory of *Southwick*, was entitled to receive the other three fourth parts thereof. And that after the death of *C. Williams*, the plaintiff, being thereby set at large, commenced the action now referred. It was further sworn, that the tithes submitted to both awards, and awarded as due and arising from such part of the west side of *Southwick* as formerly lay in tenantry, or was the sheep *Down*, adjoining to (though no part of) the farm lately occupied by *Colville Bridger*, where the same tithes as were meant and intended to be submitted by the order of *nisi prius* to the award of the present arbitrator, and were in fact included therein, under the general authority of settling all matters in difference between the parties, any, or either of them; the tithes arising from the lands called *Southwick West Laines* and the *Down* belonging thereto, being matters in dispute between the parties, the plaintiff claiming the whole thereof,

1811.

PROSSER  
v.  
GORINGE.

[ 429 ]

1811.  
 PROSSER  
 v.  
 GORINGE.

[ 430 ]

of, and *T. P. Hooper* claiming one fourth part thereof from the defendant. It was also sworn that from the evidence of the several witnesses produced by the parties before the arbitrator, (some of whom were very old,) and from the deeds, terriers, maps, and documents produced by the parties to and left with the arbitrator, it had appeared that the farm lately occupied by *Colville Bridger*, and the lands which formerly lay in tenantry on the west side of *Southwick*, or were the sheep *Down* adjoining, (which farm and lands were then in the occupation of the defendant and others, and the tithes of the whole whereof were in dispute as aforesaid,) formerly consisted of several small farms, some of which were titheable to the parish of *Kingston Bowsey*, and the remainder to the parish of *Southwick*, and the whole of which farms lay very much interspersed together in very small pieces, and that such farms had, for nearly a century past, been laid together.

*Shepherd*, Serjt. now shewed cause against this rule. The arbitrator was correct in awarding a verdict for the defendant; for, if the plaintiff brings trover, he must prove the specific goods to be his, and that he cannot do, as the arbitrator has expressly found; therefore, the award is more favourable to the plaintiff than he had a right to expect. The power being so ample, to award what the arbitrator shall think fit to be done, he had power to award that the parties should accept undivided moieties, when he could not ascertain the boundaries of the particular land out of which the tithe of the respective parties was to issue.

The reverend plaintiff supported his rule in person, and after lamenting that his too great deference for the opinion of the learned Judges who had presided at *nisi prius*, had in three different instances induced him to refer his right to the tithes in question, pending discussions with three successive rectors of *Kingston Bowsey*, to arbitrators, who, in each instance, had bound him by erroneous awards, and expressing his determination that, should he outlive the present rector, no similar weakness should induce him to compromise his common law rights without bringing them before the Court, he stated, (for, being unacquainted with the practice of the Court, he was unprepared with any affidavits,) that the first award had been made by a gentleman long since deceased, who awarded to the rector of *Kingston* one third of the tithe of *Colville Bridger's* farm, which that arbitrator conceived to be commensurate with the farm formerly occupied by *John Monk*, but that that farm in fact

fact consisted of 43 acres only, whereas *Colville Bridger's* farm was commensurate with the whole parish of *Southwick*. Upon the hearing of the present case it was undisputed, he said, on the evidence, that all the lands, of which the tithes were claimed on either side, lay within the parish of *Southwick*, therefore the plaintiff's common law right, as rector, to all the tithes thereof, was clear; and if the defendant, or Mr. *Hooper*, would impugn it, it was for them to shew it certain, to the tithe of what particular land *Hooper* was entitled. Previous to the first award, the rector of *Kingston* had made his claim, as for a portion of tithe; that ground was now abandoned, and the claim now was, that a part of the land was in *Kingston* parish, of which there was no evidence whatsoever. If, as the arbitrator says, it was impossible to specify the lands, of which the tithes belonged to the rector of *Kingston*, the legal consequence was, that the tithe of the whole belonged to the rector of *Southwick*. The award too was bad, on account of the inconvenience of the mode of enjoyment directed, by undivided moieties; neither rector singly can let his tithe; a farmer will not take a lease of one quarter of every lamb, fleece, pigeon, measure of milk, and article of small tithe, nor of every sheaf. This mode was extremely advantageous to the defendant, who was seised in fee of the soil of both parishes, and the advowson of *Kingston*, and who, obtaining from his own clerk on easy terms a demise of the one fourth, had it in his power to render the other three fourths wholly unproductive to the rector of *Southwick*, for he would give him no more rent than he chose for them, and no other farmer would take a demise of such a property. There was, besides, no ground for awarding so much as one fourth, and if the power of the arbitrator extended to that, it would equally have enabled him to give three fourths, or nineteenths, or to have left the rector of *Southwick* to perform his parochial duty without any tithe at all. The arbitrator had also departed from his authority, which was, to ascertain what lands were severally titheable, meaning to set out the land separately and distinctly. If he might thus make a random shot, and dispose of the plaintiff's property in this manner, there was an end of all right.

MANSFIELD, C. J. proposed that the land should be valued, and the tithe of one fourth in value allotted to the rector of *Kingston*: but the plaintiff insisting that the rector of *Kingston* was entitled to nothing at all, the Chief Justice proceeded to deliver

1811.

PROSSER

v.

GORINGE.

[ \*431 ]

[ 432 ]

1811.  
 PROSSER  
 v.  
 GORINGE.

[ 438 ]

deliver the opinion of the Court. The arguments of the plaintiff are much more proper to support a rule to set aside the order of reference, than to overthrow this award; but no such rule has been applied for, and therefore we are to decide merely whether the arbitrator has exceeded his power. The plaintiff objects, that *Hooper* is not entitled to the tithe of any share of *Southwick* parish. This matter has been much litigated, and all the persons who have made awards on it, have been of opinion, that some of the land lay in *Kingston*. It is said, (by *Shepherd*, not sworn,) that the poor-rates and other taxes of this land are paid in the like proportion between the two parishes. Unless the parties had obtained a writ of partition, or a commission out of Chancery, it would be very difficult for any court before which an action respecting this matter was tried, to acquire a correct knowledge of this fact, and therefore it has occurred to every Judge who has tried the cause, that it would be desirable to submit the whole to some disinterested and sensible man, which has been done in this instance; and the power is couched in very large and unusual terms; the parties, doubtless, foreseeing the difficulty there would be in ascertaining the particular lands, empowered the arbitrator to devise all means for avoiding future litigation. The arbitrator seems to have made as wise and as fit an award as could be made under the circumstances. There is no evidence before the Court, to shew that any injustice has been done; there is no impeachment of the conduct of the arbitrator: we therefore see no objection to the award, and the

Rule must be discharged,

May 16.

GWILLIM v. STONE.

An agreement to grant a lease contains no implied engagement for general warranty of the land, nor for delivery of an abstract of the lessor's title.

THIS was an action upon the case. The plaintiff declared upon an agreement made between the plaintiff and the defendant, that the defendant should grant to the plaintiff a lease of certain ground in *Fleet Market* for the term of 61 years from *Christmas* then next, under the rent of a pepper corn to *Christmas* then next, and the yearly rent of 54*l.*, clear of all then present or future taxes, for the residue of the term, and that the plaintiff should by such lease covenant to lay out 1000*l.* in buildings, in three years, and to insure the premises for 1000*l.* at least, in some public office, and in case of fire to lay out the money

money recovered in new erections, and that usual covenants should be inserted in such lease, and that the lease should be prepared at the joint expense of the parties: the plaintiff then averred mutual promises of performance, and stated, that although he, the plaintiff, had always been ready and willing, and still was ready and willing to perform the agreement in all things on his part, whereof the defendant had always had notice, yet the defendant had not performed the agreement, but had thereby deceived the plaintiff, in that the defendant had not made out or shewn, nor had he, nor could he have, any sufficient title or power to grant to the plaintiff such a lease of the said ground, although he, the defendant, after the making of the agreement, and after a reasonable time to make out and shew to the plaintiff a sufficient right or title to grant such lease as aforesaid had elapsed, was requested by the plaintiff to make out and shew to him such a sufficient right and title; but the defendant had hitherto refused, and still did refuse, contrary to the tenor and effect of the agreement, and of his undertaking. And he further alleged that the defendant having permitted the plaintiff to take possession of the ground in expectation of the performance by the defendant of the agreement, he the plaintiff afterwards, confiding in the promise of the defendant, did expend large sums of money in and about the endeavouring to ascertain the right and title of the defendant to grant such lease, and also in and about digging out the foundations of the buildings so to be erected, and divers other necessary and proper works for preparing to make and erect such buildings, and the purchasing timber and other materials for such buildings; and the plaintiff had also been deprived of all the profits, benefits, and advantages which he ought, and might, and otherwise would have derived and acquired from the granting of the lease. The second count stated the agreement and mutual promises, as in the first count, and averred that the defendant undertook, that he, the defendant, would procure and deliver to the plaintiff an abstract of the title to the ground, in due and convenient time, for enabling the plaintiff to ascertain the right of the defendant to grant to the plaintiff such a lease, and averred his readiness always to accept such a lease, and to perform the agreement on his part; and that although the plaintiff, after a reasonable time for the delivery to him of an abstract had elapsed, requested the defendant to procure and deliver to him such an abstract, yet the defendant did not nor would,

1811.

—  
GWILLIM  
v.  
STONE.

[ 434 ]



1811.  
 ———  
 GWILLIM  
 v.  
 STONE.

would, in due and convenient time for enabling the plaintiff to ascertain the right of the defendant to grant him such a lease of the ground, deliver such abstract, but therein wholly failed and made default, and the defendant wrongfully neglected to furnish any abstract of title to such ground for a long and unreasonable time, to wit, hitherto. There was also the like allegation of special damage, as in the preceding count. There were also the usual money counts. The defendant pleaded the general issue. Upon the trial of this cause at *Guildhall*, at the sittings after *Michaelmas* term 1810, before *Mansfield*, C. J., the evidence was, that the parties had entered into and signed an agreement, "that the defendant should grant to the plaintiff a lease of the ground in *Fleet-market* for 61 years, from *Christmas* then next, under the rent of a pepper corn to *Christmas*, and the yearly rent of 5*l.* clear of all present or future taxes, for the residue of the term, the plaintiff to covenant to lay out 1000*l.* in buildings in three years, to insure the premises for 1000*l.* at least, in some public office, and in case of fire, to lay out the money recovered in new erections. Usual covenants. The lease to be prepared at the joint expense of the parties." The plaintiff was forthwith put into possession of the key and ground, and cleared away the rubbish, dug the foundation, and purchased timber and other materials for his intended buildings; but on clearing away the earth, the workmen came down to a foundation of a former building that had stood on part of the same ground which was included in the defendant's plan, designated in the margin of his conveyance, and which evidently belonged to the owners of the adjoining premises, who were trustees of Bishop *Andrews's* almshouses, and who, upon learning the circumstance, asserted their claim to part of the ground, being from 12 to 15 feet square at one end, and at the other end about 25 feet in length, the loss of which broke in upon the plan of the plaintiff's intended building. The plaintiff, upon this discovery, required an abstract of the title to the premises to be delivered to him, which was not complied with; but the defendant filed his bill in equity, praying a specific performance, or that the agreement might be cancelled. Upon an interlocutory order referring it to the Master to inquire whether the plaintiff in equity could make a good title to the premises, and if he could not to the whole, whether the deficient part was essential to the enjoyment of the premises, the Master reported, that he could

[ 436 ]

not make a good title to any part of the premises, and the Master of the Rolls dismissed the bill, and directed the plaintiff in equity to deliver up his part of the agreement to be cancelled. His Honour refusing to make any compensation to the defendant in equity for the expenses he had incurred, but giving him liberty to bring any action at law to which he might be advised. The jury found a verdict for the plaintiff with nominal damages, the Chief Justice reserving to the defendant liberty to move for a nonsuit, and to the plaintiff the point whether he was entitled to any thing more than nominal damages; and if the Court should be of opinion that he was, the amount was to be referred to the associate.

1811.

GWILLIM  
v.  
STONE.

*Lens*, Serjt. in *Hilary* term last moved for a rule *nisi* to set aside this verdict and enter a nonsuit, and also for a rule *nisi* to arrest the judgment. *Best*, Serjt., on the other hand, moved for a rule *nisi* to increase the damages, by the amount which the plaintiff had expended in examining and litigating the abstract, clearing the ground, and purchasing materials, and in other expenses preparatory or incident to the plaintiff's intended building. The Court granted all the rules.

*Best* now shewed cause against the two rules which the defendant had obtained. As to the first, he contended, that both the agreement laid in the declaration, and the breach of it there alleged, had been proved. The objection, therefore, if any, is on the record, and does not go to a nonsuit. The plaintiff alleges that the defendant did not and could not make a title, and he has proved that allegation. As to the second rule, the agreement to grant a lease is equivalent to an absolute covenant for title in a conveyance; therefore it is a breach of such an agreement not to make a title. If this action had not been maintainable, the Master of the Rolls would not have directed it to be brought.

[ 437 ]

*Lens*, *contra*. The plaintiff ought to have averred a direct breach of the contract to lease, instead of which he pursues this indirect mode of shewing that the defendant did not keep his contract, because he did not perform these collateral matters. The general issue in *assumpsit* puts in issue the truth of all the allegations; therefore the plaintiff was bound to prove, upon his first count, the allegation, that the plaintiff entered by the defendant's permission, which is a material allegation; but there was no proof in the cause of any such permission, therefore the defendant is entitled to a nonsuit. Whatever loss the plaintiff sustained,

1811.

—  
 WILLIM  
 v.  
 STONE.

[ 438 ]

sustained, or money he expended, he did it in consequence of his having prematurely taken possession, and for his own gratification. If the lease had been actually granted, it was to be a lease with all usual covenants, and it is an usual covenant in a lease, to covenant for the lessor's title only against himself and all claiming under him, which qualifies the general warranty contained in the words *dedi et concessi*. And though some very cautious persons insert an absolute warranty in leases, yet it is not an usual covenant; and if it were, nevertheless a mere agreement for a lease does not contain by implication the same warranty.

[ 439 ]

MANSFIELD, C. J. The great contest in this case was, whether the defendant's permission to the plaintiff, who was in great haste to enter on the ground and begin building what he intended to build, amounted to any sort of contract to reimburse him for his loss sustained under this permission. The plaintiff could have more directly raised the question whether he was entitled to a lease containing an absolute warranty, if he had averred that he applied to the defendant for a lease, and that the other refused it: for a lease must necessarily mean a valid lease; and if the defendant had granted him an invalid lease, or had refused to grant any, it would have been a breach. Are we to say that this agreement contains in it a covenant for good title? The plaintiff might have called on the defendant for a lease with all proper covenants, and if he had refused to admit proper covenants for title, the plaintiff might have sued for the breach, and might so have raised the question, what are proper covenants. No reliance can be placed on the circumstance of the Master of the Rolls having permitted this action to be brought: he did not draw the declaration, neither do judges give an opinion upon that which is not before them. The amount of the loss which the plaintiff has sustained is of no avail: it was his own folly to take possession before he had a title. There is no pretence for the motion to increase the damages; we have disposed of that. As to the rule for a nonsuit, suppose there had been no allegation of permitting the plaintiff to enter; but that the declaration had ended with the breach of the defendant's having no title, and issue had been joined on that breach, and the parties had thereon gone to trial, what would have been put in issue? The agreement and that breach. You cannot say that that breach would not be proved, for there was not a good title; therefore the defendant must be contented with having the judgment arrested.

LAWRENCE, J. The averred agreement to make a good title certainly is not expressed in the contract, and as to the agreement alleged in the second count, to deliver an abstract, it is all poetry, the mere fancy of the special pleader; there is no trace in the evidence of any such contract. I have always understood that in purchases of land, the rule is, *caveat emptor*; the extent of the plaintiff's loss can make no difference. There may be ground to arrest judgment upon the record, and there may be also ground for a nonsuit. The breach alleged appears to me to be ill alleged, and that is a ground of arresting the judgment. The issue is on the breach. As to the averment of permission to enter, that is a mere allegation of special damage.

CHAMBRE, J. We cannot consider the agreement as equivalent to a covenant for title in an absolute conveyance.

Rule absolute for arresting the judgment.

Rule for a nonsuit discharged; and

Rule to increase damages discharged.

1811.

GWILLIM  
v.  
STONE.

DOE, on the Demise of VINE and Others, v. ROBERT FIGGINS and ROBERT SLOPER. [ 440 ]  
May 6.

JOHN FIGGINS became a bankrupt in 1801, then possessing a cottage at *Devizes*, demised to *Sloper* at 3*l. per annum*, and charged with a debt of 15*l.*; *Vine* and *Baiss* were the bankrupt's assignees, and at a meeting of the commissioners and assignees, held about that time, it was concluded that the cottage would not be worth the expense of a bargain and sale, and therefore the bankrupt was permitted to remain in pernuancy of the rents and profits, which during three years his tenant *Sloper*, by his direction, paid to *Dew*, the lender of the 15*l.*, in part liquidation of his debt. During that demise another *Figgins*, the father of the present defendant, laid claim to the premises, and *Sloper* dying, he got into possession; and after his death, the defendant, who was uncle to the bankrupt, also took possession. The bankrupt obtained his certificate in 1802, and had since conveyed the premises by lease and release to *Hubbard*, who paid off the 15*l.*, and paid a further consideration. He had brought this ejectment to recover the premises, upon the several demises of, amongst others, the assignees, and the commissioners, and had obtained judgment, execution, and possession.

The Court will not, at the instance of the defendant in an ejectment, interfere against a plaintiff who lays a demise by the assignees of a bankrupt without their permission, they having given up the property to the bankrupt, and the plaintiff claiming under him.

1811.

DOE,  
Lessee of  
VINE,  
v.  
FIGGINS.

[ 441 ]

*Best*, Serjt., upon an affidavit of *Vine*, the assignee, that he did not know of the existence of this property, and that the assignees had never authorized *Westmoreland*, the plaintiff's attorney, to lay a demise in their names in the ejectment, had obtained a rule *nisi* that all proceedings might be set aside with costs, and that the plaintiffs, or their attorneys, should pay the defendants their costs, and also pay to Mr. *Stephen Williams*, who had been solicitor to the commission against *John Figgins*, and who was the attorney for the defendant in this action, the costs of this application.

*Vaughan*, Serjt. now shewed cause. He observed that the defendant's attorney had not ventured to swear that the assignees had now employed him, or authorized him to transfer the use of their supposed rights to the defence of the present action: and he suggested that the contrary was the fact. That even if they had authorized it, there was no ground for the motion; for as the action had succeeded, the assignees were not hurt; there were no costs to which they could be liable, and as the bankrupt and his assigns were equitably entitled to the premises, they had a right to sue in the names of the assignees, upon giving a proper indemnity against costs, which, if demanded, the plaintiff would have willingly given. *Westmoreland* had sworn he was employed by the real plaintiff to bring this ejectment, and that he had added the demise by the assignees upon the advice of his special pleader; it was not now competent for the real defendant to shelter himself from the payment of costs under this contrivance.

*Best*, *contra*, contended that the plaintiff's attorney had acted wrong in using the name of the assignees, (by whose solicitor he, *Best*, was instructed to support this rule,) in order to obtain a judgment, which was to be used adversely to the defendant, and he suggested that the defendant was the tenant of the assignees.

*Westmoreland* had sworn that his special pleader advised him to obtain the consent of the assignees and commissioners to the laying a demise in their name, and he had not applied for that consent.

[ 442 ]

MANSFIELD, C. J. This rule must be considered as obtained at the instance of *Robert Figgins*, the defendant, not of the assignees. Why should we interfere? No creditor complains. The opinion of the special pleader, that consent should be asked of the assignees and commissioners, (at least of the latter, for the legal estate never was in the former,) was exceedingly proper because in the event of the plaintiff's failure, they would have

been

been liable to costs; but the plaintiff has succeeded, and there are no costs to pay. This is a fine contrivance for defeating the action.

HEATH, J. *Westmoreland* has exculpated himself. If the ejectment had proceeded on the demise of the assignees only, they might have prevented execution from being sued out; but here are demises by others, therefore the assignees cannot prevent the execution.

LAWRENCE, J. That is an additional reason for discharging this rule.

Rule discharged with costs.

---



---

MONTAGU v. JANVERIN.

May 8.

THIS was an action for money had and received, money paid, and on an account stated, brought to recover one third part of the amount of the freight of dollars, carried by his majesty's sloop *Pluto*, commanded by the defendant. At the trial before Mansfield, C. J. and a special jury, at the sittings after *Trinity* term 1810 at *Guildhall*, a verdict was found for the plaintiff, damages 182l. 18s. 4d., with liberty for the defendant to move for a new trial, or upon a case to be reserved, as the defendant might deem most expedient. The substance of the evidence was as follows: The plaintiff, Admiral *Montague*, before and at the time of the sailing of the *Pluto*, hereinafter mentioned, and thence, until, and after the time of her return, was commander in chief of his majesty's ships and vessels at *Spithead*, and in *Portsmouth Harbour*, from *Beachy Head* to the *Start*, and between *Cape Antibes* and *Cape Barfleur* on the enemy's coast. Previous to *July* 1808, the *Pluto* was put under the command of the plaintiff, as such commander in chief, and whilst it continued under his command, he received the following letter, addressed to himself, from the under secretary of the admiralty, which was written and transmitted by the orders and authority of the lords commissioners of the admiralty:

Sir, Admiralty Office, 15th *July* 1808.

I am commanded by my lords commissioners of the admiralty to signify their direction to you, to order the captain of the

1811.

DOE,  
Lessee of  
VINE,  
v.  
FIGGINS.

The flag officers of a fleet have no right to any share in the gratuity of one half per cent., which is given to the captains of

[ 443 ]

ships of war for carrying public treasure on board their ships.

Nor in the freight received by captains for carrying the treasure of individuals. *Semble* (a).

(a) See *Brisbane v. Dacres*, post. vol. 5., *Trin. Term* 1813.

1811.  
 MONTAGU  
 ?  
 JANVERIN.

*Solebay* to receive on board that ship five hundred thousand dollars, intended for the kingdom of *Leon*, and proceed with the same without loss of time to *Gijon*, and having delivered the same to Mr. *Hunter*, the *British* agent at that place, or his deputy Mr. *Kelly*, to return to *Spithead*, and follow his former orders. If you should be of opinion that the *Solebay* cannot be so long spared from her station, you are in that case to employ the *Pluto* on this service; and you will signify to commissioner *Grey* their lordships' desire, that he should afford every assistance in his power to facilitate the shipment of the money on its arrival at *Portsmouth*.

(Signed) *John Barrow.*

On the receipt of this letter, the *Solebay* having previously left *Spithead*, the plaintiff sent to the defendant, then being at *Spithead*, under the command of the plaintiff, the following order:

[ 444 ]

By *George Montagu*, Esq., admiral of the white, and commander in chief of his majesty's ships and vessels at *Spithead*, and in *Portsmouth Harbour*, from *Beachy Head* to the *Start*, and between *Cape Antibes* and *Cape Barfleur* on the enemy's coast. Pursuant to directions from the lords commissioners of the admiralty, you are hereby required and directed to receive on board his majesty's sloop *Pluto*, under your command, five hundred thousand dollars intended for the kingdom of *Leon*, and proceed with the same without one moment's delay to *Gijon*; and having delivered the same to Mr. *Hunter*, the *British* agent at that place, or to his deputy Mr. *Kelly*, return to *Spithead*, and follow your former orders.

Given on board the *Royal William*,  
 at *Spithead*, 16th July 1808.

To *Richard Janverin*, Esq.

*Geo. Montagu*—

Commander of his majesty's ship *Pluto*.

By command of the admiral,

*W. A. Davies*, Ro. Sec.

The defendant, in pursuance of and under that order of the plaintiff, received the dollars on board, sailed to, and delivered them at *Gijon*, and returned to *Spithead* under the orders of the plaintiff. The defendant, since he performed that service, and before the commencement of this action, received from the Treasury, for the freight of the said dollars, the sum of 548l. 9s. net, by virtue of the following warrant:

*Georg*—

*George R.*

Our will and pleasure is, that out of any money in your hands that may be imprested to you for this service, you do issue and pay, or cause to be issued and paid, unto our trusty and well beloved *Richard Janverin*, Esq., commander of our ship *Pluto*, or to his assigns, the sum of 562*l.* 10*s.* without deduction and without account, which we are graciously pleased to allow him for freight of specie conveyed by him on board our said ship from *England* to *Gijon*; and this shall be, as well to you for making the said payment, as to the commissioners for auditing the public accounts, and all others concerned in passing your accounts, for allowing the same thereupon, a sufficient warrant. Given at our court at *St. James's*, the 21st day of *February* 1801.

By his majesty's command,

(Signed) *W. Broderick.*

*W. S. Bourne.*

*W. Elliott.*

To the paymaster-general of  
our guards, garrisons, and  
land forces.

Captain *Janverin*, 562*l.* 10*s.*, for freight of specie to *Gijon*.

When an order is so transmitted by the admiralty to an admiral commanding in chief, and in consequence of that an order is given by him to the captain, the latter acts under the command of the admiral, and not under a separate admiralty; and the *Pluto* was dispatched upon the said service by the plaintiff, and during the whole of it was acting under his orders. It had been the usage in the navy, previous to the year 1801, when any consideration was made to the captain of any of his majesty's ships for the freight of private or public money, for the commander in chief, under whose orders such captains sailed, to receive from them one third part of all money paid to such captains for freight; which, if there were more than one flag officer, was divided by the commander in chief in certain proportions between himself and the junior flag officers; but if there was no other flag officer, the commander in chief kept the whole. The plaintiff had no such flag officer under him. In 1801, the allowance, made before that time for the payment of freight for the carriage of public money by ships of war, was discontinued; and no such allowance was paid from that time till 1807, when the following correspondence on the subject passed between the secretary of the treasury and the secretary of the admiralty.

1811.

MONTAGU

v.

JANVERIN.

[ 445 ]

[ 446 ]



1811.

Sir,

Treasury Chamber, *March 5, 1807.*

MONTAGU

v.

JANVERIN.

The lords commissioners of his majesty's treasury, having resumed the subject of the allowance of freight, claimed by captains of his majesty's ships, for the conveyance of specie on account of the public service, I am commanded by their lordships to acquaint you, for the information of the lords commissioners of the admiralty, that upon a careful consideration of all the circumstances connected with the subject, my lords are of opinion, that it might be expedient, in case the lords of the admiralty should see no objection to the measure, that captains of men of war should have in future, (whenever they shall receive any specie on board on account of the public service,) a certain fixed moderate allowance, as a compensation for the care and custody of the same; in which case, my lords conceive, that one half *per cent.* would be a fair and adequate compensation, and that no more than one freight should be allowed, even where the money may be transhipped before the arrival at the place of its destination. If the lords of the admiralty should see no objection to the measure here proposed, my lords are also of opinion that it would be of great advantage and convenience to the public services, particularly on foreign stations, that a general regulation to this effect should be made, and communicated to all admirals and captains of men of war on service. I am therefore commanded to desire, that you would request of the lords commissioners of the admiralty, to have the goodness to take the subject into their early consideration, and favour their board with their opinion thereon. I am further commanded to say, that if it should appear to the lords of the admiralty, that the regulation here proposed would be injurious to the service of the navy, or objectionable in any other respect, it seems to this board that it would be for the good of his majesty's service, that the most positive instructions should, in that case, be given to all admirals and captains of men of war, employed on foreign stations, to receive specie on board their respective ships, when required so to do by any public officer in his majesty's service, to sign receipts for the same, and to deliver it at the place of its destination, (whenever the same can be done without prejudice to the particular service in which such admiral or captain shall be at the time employed,) without any charge whatever for freight, or without their being allowed to claim, detain, or receive any part of the said specie, as a compensation for the

[ 447 ]

carriage

care and trouble, or under any other pretence whatever. Their lordships are the more anxious that this point should now be finally settled, as well on account of the great security, as well as facility, that is given to his majesty's service on foreign stations by the ready conveyance of specie on board his majesty's ships, as because it appears from the accounts of some of his majesty's commissaries abroad, transmitted to the commissioners for auditing public accounts for examination, that since the regulations were made, by which, in compliance with what was the opinion of this board, all commissaries were forbidden to make any allowance whatever to captains of men of war for the conveyance of specie, sums are not unfrequently charged in such accounts as having been detained by the several captains having charge of such specie, under the pretence of a *right founded upon ancient usage*, to a charge, in the nature of a poundage on the sum shipped, for their care and trouble during the time that such specie was on board; whilst, on the other hand, it is asserted by the commissioners, that the captains have in most cases refused to give any receipt for the amount of the specie they have taken on board; both of which practices are wholly inconsistent with the regularity and correctness in accounts which the board requires from its commissaries abroad, as well as from all other persons employed in the receipt and expenditure of the public money. I am further to request the lords of the admiralty will please to communicate to this board whatever regulations they may think proper to make on this occasion, that my lords may give instructions accordingly to their commissaries and other officers having charge of any public money on foreign service.

I am, &c.

Geo. Harrison.

Sir,

Admiralty Office, 10th March 1807.

My lords commissioners of the admiralty having taken into their consideration the suggestions contained in your letter of the 6th instant, upon the subject of a certain allowance of one half *per cent.* proposed to be made to the commanding officers of men of war, for the care and custody of specie entrusted to them on account of the public service, command me to acquaint you, for the information of the lords commissioners of his majesty's treasury, that their lordships are of opinion that no naval officer can have any right or claim to demand any pecuniary compensation

1811.

MONTAGU  
v.  
JANVERIN.

[ 448 ]

1811.

MONTAGU

v.

JANVERIN.

[ 449 ]

tion for the freight of any article whatever, which is put on board any of his majesty's ships of war, for any objects of public service; and that it is the duty of every naval officer to execute such orders as are given to him by persons authorized so to do, without any claim of freight, either for specie, or for any other article whatever. That nevertheless, if, in consideration of what his majesty has frequently been pleased to allow as an indulgence on similar occasions, his majesty should now be graciously disposed to direct that the allowance of one half *per cent.* shall be paid to the commanding officer who is entrusted with the carriage of specie for the public service, the officers of the navy will undoubtedly receive with due gratitude and acknowledgment any such mark of his majesty's grace and favour; and their lordships will, upon any such notification of his majesty's pleasure, give the necessary directions for carrying this regulation into effect, agreeably to the suggestions contained in the communication from the lords commissioners of the treasury.

I am, &amp;c.

To *Geo. Harrison, Esq.**B. Tucker.*

Soon after the following order was issued by the lords of the admiralty :

By the commissioners for executing the office of lord high admiral of the united kingdom of *Great Britain and Ireland, &c.* The lords commissioners of his majesty's treasury having signified to us their opinion, that a gratification should be allowed to the captains and commanders of his majesty's ships and vessels, for the freight of all public monies that shall be conveyed on board his majesty's ships, at the rate of one half *per cent.*, such allowance to be made once only for every such sum of money, however often it may have been transhipped before it may have reached its original destination; we do therefore hereby direct, that all officers charged with the transport of public money, shall, upon its delivery to the persons authorized to receive it, obtain a certificate of having so done; which certificate is to be transmitted to the lords commissioners of his majesty's treasury, who, upon due notice of the arrival of the money at the place of its destination, will then direct payment to be made, at the rate of 10s. for every 100*l.* sterling, for the whole passage of the money, from its first embarkation to its arrival at the place of its destination; and all officers who may be em-

ployed on this service, are hereby required and enjoined not to detain or withhold, on any pretence \*whatsoever, any part of the public money so entrusted to their charge.

To the respective captains and commanders of his majesty's ships and vessels.

Since making of which order, the captains of his majesty's navy have constantly received the allowance mentioned in it for conveying public money, and, according to the usage, have been required to pay, and have paid, one third thereof to the commander in chief under whose command they were; but the defendant having refused, upon the application of the plaintiff to him for one third of the said money received by him for the said freight, to pay the same, the present action was brought to recover it.

*Best*, Serjt., for the defendant, in *Michaelmas* term 1810, accordingly moved for a new trial, upon which occasion *Mansfield*, C. J. observed, that "it was easy to understand how such an usage had arisen. The admiral is commander of every ship in his squadron. The articles of war prohibit the captain of a ship of war from taking on board and carrying any merchants' goods whatever, except bullion; but that he may carry. As to bullion, however, the captain is so completely under the control of the admiral, that the admiral has it in his power to say, "if you do not allow me this proportion out of the freight, you shall not carry the treasure." If the captain takes on board merchants' bullion, he signs a bill of lading for it, like the captain of a merchant ship, by which he incurs a dreadful responsibility, and is therefore well entitled to freight from the merchant. In carrying government money, at least in the present case, the captain is under no obligation to the admiral; he receives his orders immediately from those who have a right to command his services, the government of the country; and I should think that the compensation he receives, would make him responsible to government if the bullion should be lost by his mistake. These are reasons why he should retain the whole freight for his own benefit. When a fleet is abroad, the employment of every ship is, of course, under the admiral's direction; no ship can take specie on board without his orders, and if he may select ships to carry specie, or employ them in that service at his pleasure, it may sometimes happen to be a temptation to an admiral to employ his ships in a service less beneficial to the nation at large, than that to which they were destined by the admiralty; whereas

1811.

MONTAGU

v.

JANVERIN.

[ \*450 ]

[ 451 ]

1811.  
 ———  
 MONTAGU  
 v.  
 JANVERIN.

whereas the admiral's only guiding motive ought to be the public service. Nothing, however, was said at the trial upon the propriety or impropriety, or illegality of such an usage." He also observed that "it made no difference whether the ship were selected solely by the admiralty, or nominated by the port admiral out of two selected by the admiralty."

The Court granted a rule to shew cause why a new trial should not be had.

Upon a subsequent day in the same term, *Shepherd*, Serjt., for the plaintiff, would have shewn cause against the rule; but the parties having omitted to furnish to the Court copies of the necessary documents, they would not then hear it argued, and suggested that it might more conveniently be turned into a special case; which was accordingly done in the same term, in which the evidence is above stated; whereon the question reserved for the consideration of the Court was, whether the plaintiff was entitled to recover. If he was, the verdict was to stand: if not, a nonsuit was to be entered. The case was argued on this day, when

[ 452 ]

*Shepherd*, Serjt. for the plaintiff, admitted, that there was no written law, by which admirals were entitled to claim a proportion of the freight paid to the captain for carrying either public or private treasure. The claim rested wholly on the practice of the navy. But it had been recognized in courts of justice; for in an action, in which he was himself of counsel, brought in 1801 by Sir *Wm. Parker*, then the junior flag officer on the *American* station, against Mr. *Tucker*, the agent of Lord *St. Vincent*, to recover his proportion of the one third part of the freight, which Lord *St. Vincent*, then commander in chief on that station, had received from a captain, who had carried some hullion, the plaintiff succeeded. Many admirals were called as witnesses on that trial, who spoke to their own practice, and to that of old admirals then dead; and they even carried it back so far as the time of Sir *George Rooke*, and the plaintiff in that case recovered, merely on the ground of the universal practice of the navy. Unless the plaintiff had been entitled upon the general law to recover, he could not have succeeded in that case, for Lord *St. Vincent* had received the whole amount, and the claim was not founded on any alleged agreement between the parties. In the case of *Donelly v. Popham*, ante, vol. i. p. 1., it was admitted, that if Sir *Home Popham* was a flag-officer, he had right to recover one third part of the sum which Captain *Done*

had received for the freight of the treasure brought home in the *Narcissus*. [Mansfield, C. J. observed that in that case there was no dispute about the custom.] The plaintiff there did not bring the custom into dispute, but it was taken for granted, that the flag officer, if there had been one, had a right to share the freight. If, then, there were such a custom formerly, can the cessation of the practice of paying freight to the captains, and the subsequent order renewing it, make any alteration? It seems, that when captains had carried treasure for the public, an idea had prevailed among them that they had a lien on the money; and it had been their practice to detain a part of it, by way of paying themselves the freight; which certainly was an illegal act for them to do, unless they had received permission for it from the government. This practice is alluded to and forbidden, in Mr. *Harrison's* letter of the 5th of May 1807. But the captains universally received the freight themselves, and paid over a proportion of it to the admirals: no part of it was ever paid by government to the admirals in the first instance. And although the language of the new orders is, that "the allowance shall be made to the captains and commanders of his majesty's ships and vessels," yet the orders rather contemplate that the money shall be paid to the persons entitled to it, than designate who those persons are. For the duty of obtaining and transmitting the certificate, and the prohibition of not retaining any part of the money, are expressly laid on "all officers charged with the public money, and who may be employed on this service." Who then are they? The expression must be construed in the same way as the prize proclamations, which give a share of the prize-money to the flag-officers "directing and assisting in the capture;" that is, it must include the admirals under whose command the ship bearing the treasure is dispatched. The plaintiff therefore was as much employed in this service, as the defendant, and is as much entitled to his proportion of the freight. If he be not entitled to receive his proportion from the captain, the case of *Parker v. Tucker*, cannot be law: for the right of a junior admiral to receive his proportion of the third part from the senior admiral, must rest on the same principle.

*Best*, Serjt. who was to have argued the case on behalf of the defendant, was stopped by the Court.

MANSFIELD, C. J. delivered the judgment. This was a point very fit to be decided. In the first place, it is difficult to conceive

1811.

MONTAGU  
v.  
JANVERIN.

[ 453 ]

[ 454 ]

1811.  
 MONTAGU  
 v.  
 JANVERIN.

[ 455 ]

conceive how there can be a custom to divide money given by way of bounty. For this money, paid to the captains as a gratuity for carrying bullion, is a gratuity, which they have no right to demand; it is paying them for that which they are bound to do without any gratuity. For the commander of every king's ship is bound to perform that, and every other service he is put upon. The gratuity used to be one *per cent.*, and is now one half *per cent.*, but for six or seven years, nothing was paid at all. The captains, during that period, had no right to any thing: of course, during the same period, admirals had no right to any thing. In carrying public money, the same thing would not happen, as in the case of carrying the bullion of private persons; there would not be the same temptation to give one captain a preference over another, because the government probably selects the captain who shall have the charge of the treasure. There was some variance in the evidence, as to whether the custom extended to public money, or to private money only. There could be no custom as to the amount paid for carrying bullion for private persons; for the amount of freight of private treasure must depend on the contract made in each case; but some of the admirals who were examined at the trial, stated that it was a practice to dispatch ships away from the fleet, and away from the station upon which they were employed, to a distinct place, for the purpose of carrying private bullion. It struck me that this would be a very dangerous practice; for an admiral ought to employ the ships solely with a view to the public service; but this would be a perpetual temptation to admirals to forget their duty, and instead of employing ships in the service most useful to the public, to send them upon this service, in which the admirals could find their private emolument. It is not at all wonderful, that when such a practice had crept in, it should continue: for it must be very much a captain's interest to obtain the favour of his admiral; and therefore he would not venture to contest the right insisted on. The legality of the custom has never been discussed in any of the cases which have arisen. In the case of *Parker v. Tucker*, both parties insisted on the custom; both agreed that a share was to be taken from the captain, for the benefit of one or more admirals, and the only question was, whether it was for the benefit of one or of both. In the case of *Donnelly v. Popham*, both parties acquiesced in the custom. Captain *Donnelly* did not mean to quarrel with the whole body of  
of

of admirals, which he must have done, if he had disputed the legality of the custom. But it was sufficient for him to shew that the commodore was not a flag officer, not being authorized by the admiralty to have a captain under him, and therefore, on that ground, not entitled to a share in the freight. It seems to me quite impossible that such a custom should exist in law, or that the practice should be known to the lords of the admiralty. If they had approved the practice, they would have noticed it when they made the order for the new allowance of freight. What has been said respecting the impropriety of detaching ships from their stations with bullion, must not be understood as applicable to the present case, because this treasure was ordered by the higher powers to be carried on board the *Pluto*, and not by the admiral, who is, in this instance, only the instrument to execute their orders.

The rest of the Court concurring,

Rule absolute to enter a nonsuit.

1811.

MONTAGU  
v.  
JANVERIN.

OLIVER, Esq. v. Lord W. C. BENTINCK.

[ 456 ]

May 8.

THE plaintiff declared that he had been a good subject, and had been colonel of a certain regiment in the service of the *East India Company*, and had been and was retained and employed by, and in the service of, the Company, as commanding officer of the *Melucca Islands*, and as such colonel and commanding officer had always conducted himself with great integrity, fidelity, and honour, and never was guilty, or until the publishing of the libels after-mentioned, suspected to have been guilty of any misconduct or violation of the trust reposed in him as such commanding officer, or otherwise; and that the defendant, maliciously intending to injure the plaintiff in his good name, &c., and to cause it to be suspected and believed, that the plaintiff had been and was guilty of a gross violation of the trust reposed in him as such commanding officer, at *Fort St. George* in the *East Indies*, (to wit) at *Westminster*, the defendant then and there being governor of *Madras* and its dependencies, falsely and maliciously did publish and cause to be published concerning the plaintiff, and concerning his conduct as such commanding officer, and concerning the Court of Directors of the Company, a certain false, scandalous, malicious, and defamatory libel, dated *Fort St. George*,

Plea justifying a libel, which stated the grounds on which the plaintiff was dismissed the *East India Company's* service, on the ground that the Company ordered defendant, as Governor in Council, to dismiss the plaintiff for the reasons assigned: the plea does not shew a sufficient justification for publishing the causes of dismissal.



1811. 1st *July* 1807, concerning the plaintiff, viz. The Honorable the Court of Directors having resolved to dismiss Colonel *J. Oliver* of this establishment, from the service of the Honorable Company, for gross violation of the trust reposed in him as commanding officer of the *Molucca Islands*, the Right Honorable the Governor in Council directs, that the name of Colonel *J. Oliver* be erased from the army list of this presidency, from the 20th *June* last, being the date of the receipt of the orders of the Honorable Court at *Fort St. George*, by order of the Right Honorable the Governor in Council, (signed) *G. Strachey*, secretary to government. The defendant pleaded first, not guilty; 2dly, that before the publishing and causing to be published the supposed libel, to wit, on the 10th day of *February* 1807, at *Westminster*, the Court of Directors of the *East India* Company did resolve to dismiss the plaintiff from the service of the Company, for a gross violation of the trust reposed in him as commanding officer of the *Molucca Islands*, and did then and there order the Governor in Council of *Fort St. George*, on the receipt of that order, to erase the name of the plaintiff from the army list of the presidency; and that afterwards, to wit, on the 20th day of *June* 1807, at *Fort St. George* aforesaid, to wit, at *Westminster*, he the defendant, then and there being the Governor of *Fort St. George*, did receive the said order of the Court of Directors; wherefore he the defendant afterwards, to wit, on the 1st day of *July* in the said year 1807, at *Fort St. George*, to wit, at *Westminster*, then and there being such Governor, in the discharge of his duty and office as such Governor, did publish and cause to be published the supposed libel, as it was lawful, &c. He, thirdly, pleaded, that before the publishing the supposed libel, the Court of Directors of the *East India* Company, by a certain public official dispatch duly made and sent from the Court of Directors to the Governor and Council of *Fort St. George*, did inform the Governor and Council, that the Court of Directors had resolved to dismiss the plaintiff from the service of the said Company for a gross violation of the trust reposed in him as commanding officer of the said *Molucca Islands*, and did by that dispatch order the Governor and Council of *Fort St. George* on the receipt of that order to erase the name of the plaintiff from the army list of that presidency; and that afterwards the defendant, then and there being the Governor of *Fort St. George*, did receive the said dispatch of the Court of Directors. Wherefore he, the defendant,

OLIVER  
v.  
BENTINCK.

[ 457 ]

[ 458 ]

defendant, afterwards, then and there being such Governor, and as such Governor, in the discharge of his duty and office as such Governor, did publish the supposed libel, as it was lawful for him to do. The plaintiff joined issue on the first plea; and to the second replied, *de injuriâ suâ propriâ*; and to the third he replied, protesting that that plea was wholly insufficient in law, that he, the plaintiff, before the publishing the libel, had not been guilty of a gross or other violation of the trust reposed in him, the plaintiff, as commanding officer of the Tobucca islands. The defendant joined issue on the second plea, and demurred to the replication to the third plea; and the plaintiff joined in demurrer.

*Best*, Serjt., on behalf of the defendant, contended that as well the declaration, as the replication to the third plea, were open to his demurrer. There is no more ground for maintaining this action, than if the commander in chief in this country were to promulgate any order of his majesty, dismissing an officer from the service, there would be for maintaining an action against the commander in chief and the printer of the *Gazette*. At all events, if the defendant does not set out his authority with sufficient precision, it is only cause of special demurrer to the plea.

*Pell*, Serjt., in support of the plea, admitted that he did not impugn the right of the court of directors, or of the governor, to dismiss the military officers of the Company, but that the defendant ought not thus openly to have published a reason for his dismissal, which was not founded in fact; the plea assigns no ground to warrant this; the defendant avers that the court of directors enjoined him to dismiss the plaintiff, and therefore he published the cause of his dismissal: he does not say that the directors enjoined him to publish the cause. If his majesty were to dismiss an officer without bringing him to a court martial, it would not follow that the reasons of it should be published.

**MANSFIELD**, C. J. How should an officer in *India* know why he was dismissed, if the reason assigned is not to be made known. If the court of directors were peremptorily to dismiss him without assigning a reason, that would be a greater hardship on the defendant. If he had a time for coming to an explanation with his employers, there might be some reason to conceal the grounds of his dismissal till after that explanation had

1811.

—  
OLIVER  
v.  
BENTINCK.

[ 459 ]

1811.  
 ———  
 OLIVER  
 v.  
 BENTINCK.

had taken place; but justice to the plaintiff requires that it should thus be published. The libel is in fact a recital of the effect of the authority under which the defendant acts, and it would be a monstrous thing if the court of directors were to dismiss an officer without assigning a reason. One should be very sorry to have any thing like a judgment in favour of a plaintiff in such an action as this, than which a more foolish or a more mischievous one cannot easily be imagined: it is much better for the Company, for the country, and for the plaintiff himself, that the cause of his dismissal should be stated, than that it should be supposed that the *East India Company* did it *suo arbitrio*.

HEATH, J. It is the constant practice here, at home, that when a delinquent guilty of some enormity has been brought to a court martial, the commander in chief has directed the sentence to be read at the head of every regiment.

[ 460 ] LAWRENCE, J. I suppose the plaintiff's object was, to try before a jury, the circumstances of this gentleman's conduct, by a question to be raised on this record; that could never be permitted in this form. But the plea is certainly defective; for the order is issued to the governor and council, and it is not shewn that what the defendant did, he did as governor in council, he only pleads that he did it as governor, and does not shew how it became his duty to do this in his individual capacity as governor. There is a sufficient libel stated on the declaration to sustain that: suppose the defendant had received no such dispatch from the Company, could he have warranted such a publication in that case?

CHAMBRE, J. The only doubt I have on the subject is, that the plea does not state on what account it became an act in the execution of the defendant's duty to publish this. Can we suppose that he had a right to publish it in hand-bills and newspapers? The only authority he shews, is for erasing the name from the army list, not for the publication.

*The Court* permitted the defendant to amend.

1811.

May 9.

## MILLER v. ROBE and Another.

**B**EST, Serjt. had obtained a rule to set aside the award of three merchants, upon two grounds: first, that they had awarded that the defendants should give to the plaintiff, who was the captain of a ship, a bond of indemnity against a bill of exchange, which the plaintiff had given for the ransom of his vessel, the *Friendship*, of which the defendants were owners, contrary, as was contended, to the enactments of the statute 45 Geo. 3. c. 72. s. 16.; secondly, that the arbitrators had awarded 180*l.* to themselves for making the award.

*Shepherd*, Serjt. shewed cause against the first objection, upon the ground that the plaintiff, who had not surrendered his vessel, but after a most gallant action with two *French* privateers of superior force, had ransomed her in a case of extreme necessity, to be approved of by the court of admiralty, which was legalized by the same section, and that the vessel being libelled in the court of *Jamaica*, as confiscated, on account of this ransom, he had pleaded the extreme necessity, and obtained an interlocutory judgment determining that fact in his favour; and that the instrument recording that judgment and giving all costs to the plaintiff was exhibited before the arbitrators, who must be presumed to have found the fact of necessity. As to the second objection, that the accounts submitted to the arbitrators were very long, and deserved a large fee;

*The Court* discharged the rule as to all except the sum of 180*l.*, and as to that, directed the prothonotary to inquire what was a reasonable sum to pay the arbitrators for making their award, and that the sum should be reduced accordingly.

*Best* was heard in support of his rule.

If arbitrators award an excessive sum to be paid to themselves, the Court will refer it to the prothonotary to reduce it.

It is competent to arbitrators to inquire whether a ransom, for which the plaintiff seeks to be repaid, were justified by an extreme necessity within the statute 45 G. 3. c. 72. s. 16., which enables a court of admiralty to allow such necessity.

---

HORNE, Demandant; LODGE, Tenant; PRESTON, [ 462 ]  
Vouchee.

May 10.

**I**SAAC Preston, Esq., formerly of *Beeston St. Lawrence*, being seised of the manor of *Beeston*, and of divers farms in *Beeston*, *Ashmenhaugh*, and adjoining parishes, and also of the advowson, which had passed by the general word hereditaments, but refused to insert a curacy, because the right of nominating a perpetual curate was incident to and part of the rectory.

The Court permitted a recovery to be amended by inserting an advowson, because

1811.

HORNE,  
Demandant.

vowson of *Beeston*, and curacy of *Ashmenhaugh*, in the county of *Norfolk*, by his will, after reciting that he was seised of certain contingent remainders in fee, and reversionary estates in the several manors, messuages, lands, tenements, and hereditaments by him already (as he thought,) settled on his son *Jacob*, and the heirs male of his body, either by the marriage settlement of his mother, or any voluntary or other settlements, to prevent as far as he could, any dispute concerning the same, devised "all and every his manors, messuages, lands, tenements, "and hereditaments in the said towns, or elsewhere in the "kingdom of *England*, to his son *Jacob Preston*, and the heirs "male of his body, and for want of such issue male, to the "heirs male of his (the testator's) body." *Isaac Preston* died in 1768. *Isaac Preston* and *Jacob Preston* respectively presented to the living of *Beeston*, and also nominated to the curacy of *Ashmenhaugh*. In 1772, *Jacob Preston*, in order to make a tenant to the precipe, conveyed (*inter alia*), so much of his manor of *Beeston* as was freehold or charterhold, and "all others his "manors, messuages, lands, tenements, and hereditaments in "*Beeston St. Lawrence*, *Ashmenhaugh*, *Neateshead*, &c. &c., "to *Lodge*," and declared the uses to himself in fee. The recovery was duly suffered. *Jacob Preston* by his will devised "all "his manors, messuages, lands, tenements, and hereditaments to "his sisters for life, and their issue male."

[ 463 ]

*Shepherd*, Serjt. now moved on behalf of the devisees of *Jacob Preston*, to amend the recovery, by inserting the words, "*Advowson of Beeston St. Lawrence, and curacy of Ashmenhaugh*," on the ground that the same passed to the tenant of the precipe under the word hereditaments in the deed of 1772 to lead the uses, upon an affidavit that it was believed they were intended to pass. A letter from *Jacob Preston*, dated *November 1771*, to his then solicitor, was also verified by affidavit, from which it appeared that he had given instructions for suffering a recovery and for vesting in himself in fee, not only the estates mentioned in his mother's marriage settlement, but also all the rest of the *Beeston* estate. *Milbank v. Jolliffe*, 2 *Bos. & Pull.* 580. n. was cited, where the right of patronage to the curacy was expressly inserted as well as to the rectory.

MANSFIELD, C. J. You may insert the advowson of *Beeston*, but as to the right of nominating a perpetual curate to *Ashmenhaugh*, how can that be the subject of a recovery? You cannot insert that; it is a thing unknown to the law; it is, where a layman

layman is rector, as the Duke of *Portland*, for instance, is rector in *Marybone*, and appoints (as he is bound to do) a curate.

HEATH, J. The right to nominate a perpetual curate, is parcel of the rectory.

*Shepherd*, Serjt. We will give no trouble on that point, but insert the advowson only.

Rule absolute.

1811.

HORNE,  
Demandant.

### DICK v. NORRISH.

[ 464 ]

May 11.

IN this action a rule had been obtained by *Lens*, Serjt. for changing the venue from *London* to *Hampshire*, upon the usual affidavits that the cause of action arose wholly in *Hampshire*, and not elsewhere.

*Best*, Serjt. now shewed cause upon affidavits, stating that the action was brought for maliciously suing out a commission of bankrupt, which necessarily issued in *Middlesex*, and so falsifying the defendant's affidavit on which the rule was made; but the plaintiff, although his witnesses all resided in town, and many of them were clerks in public offices, who could not be carried down to *Winchester* to give evidence without great expense to the plaintiff and inconvenience to the public, was nevertheless unable to give the usual undertaking to give material evidence in *London*, though he could have done it in *Middlesex*. It was further sworn on behalf of the defendant, that all his witnesses resided in *Hampshire*, and that it would be expensive and inconvenient to him and them to try the action in *London*.

*Lens*, Serjt. endeavoured to support his motion, neither party being able to comply with the usual requisitions of the Court in the case of venue, and, under circumstances of mutual inconvenience, the rule which had been obtained must prevail. In the case of *Holmes v. Wainwright*, 3 *East*, 329, the Court of King's Bench in a similar action made the rule absolute.

MANSFIELD, C. J. The plaintiff cannot legally and truly swear, according to legal apprehension, that the whole cause of action arose in *Southampton*, because a material part arose in *Middlesex*; and it is a question whether we can change the venue, when there is a material inconvenience on both sides; on the one side

The plaintiff falsifying the defendant's affidavit to change the venue, the venue was retained, though the plaintiff could not undertake to give material evidence in *London*, where he had laid it, either venue being inconvenient to one or other of the parties.

[ 465 ]

1811. there would be a material inconvenience in changing the venue, by carrying down witnesses from town, and there would be inconvenience on the other side by bringing witnesses hither: we therefore cannot change the venue. I do not know whether we can now make any rule on the subject, but it would be a very good rule, if, with respect to all other counties in the kingdom, *London* and *Middlesex* were to be considered as the same.

Rule discharged.

[May 11.]

BARBER v. BARBER and Another.

The rule of Court, *Michaelmas* 42 G. 3., does not require the consideration of a judgment to be indorsed on the warrant of attorney.

If a warrant of attorney be given to confess judgment absolutely for a certain sum, although it be understood be-

[ 466 ]

tween the parties that it is given only to indemnify the plaintiff against his suretyship for a smaller sum, that is not such a defeazance as needs to be indorsed on the warrant of attorney. And the plaintiff needs not to defer execution till the contingency happens.

**L**ENS, Serjt. had obtained a rule *nisi* to set aside the judgment which had been entered up on the defendant's warrant of attorney, and the several writs of execution, and to restore the goods and money that had been levied, upon the ground that there was no defeazance written on the back of the warrant of attorney, as required by the rule of Court of *Michaelmas*-term 42 G. 3.

*Shepherd* and *Best*, Serjts., now shewed cause, contending that no defeazance was required under the circumstances of the present case, which were as follow. The defendants, who were traders, in *December* 1809, compounded with their creditors for 15s. 6d. in the pound, out of which the plaintiff agreed to guarantee to the creditors the third instalment, consisting of 4s. in the pound; and amounting to 5152l. 6s. 2d., for which amount he accepted bills drawn by the defendants in favour of or for the benefit of the respective creditors, which would fall due on the 22d of *April* 1811. Thereupon the defendants gave him, on the 7th of *February* 1810, a warrant to confess judgment in debt for money borrowed for 10,000l., upon which warrant there was no defeazance indorsed. The defendants had also, about a fortnight before the date of the warrant of attorney, assigned to the plaintiff a debt of 2000l. due to them from *Clarence*, and given him a bill of exchange for 5000l., drawn by the plaintiff and accepted by the defendants, dated 27th *December* 1809, and payable one month after date. It was sworn by the defendants, and had been admitted by the plaintiff at a meeting of the creditors of the defendants, that the assignment of the debt, bill of exchange, and warrant of attorney, were all intended merely for the purpose of indemnifying the plaintiff against his acceptances

ances

ness of the 5152*l.* 6*s.* 2*d.*, and that there had been no money borrowed, or other consideration; the plaintiff contended that they were also given for the purpose of enabling him to provide for the discharge of those bills. But no other security, agreement, deed, or declaration, was prepared or signed by either party. It appeared that the bill of exchange for 5000*l.*, the amount of which required a 20*s.* stamp, was made on a 10*s.* stamp only, and therefore was void. The plaintiff signed judgment on the 5th of *April* 1810 for 10,000*l.* debt, and 40*s.* costs. The defendants having again become embarrassed, the plaintiff, without any previous demand of money, or other communication with them upon the subject, on the 11th *January* 1811, issued writs of *feri facias*, directed to the sheriffs of *London* and *Surrey*, indorsed to levy 5152*l.* 6*s.* 2*d.*, besides poundage, under which executions the defendant's goods were seized, and upon the defendants having been declared bankrupts, were sold. After execution levied, the plaintiff paid his acceptances when they became due. *Shepherd* contended, first, that the giving the bill of exchange, which was a collateral security, not the consideration of the judgment, upon a wrong stamp, could not affect the judgment. If a plaintiff were to levy execution under a judgment given without any consideration at all, or if this plaintiff had levied to a greater extent than his own liability on his acceptances, the court would restrain him, not indeed with reference to the rule of court relied on, which does not apply to such a case, but because it would be an abuse of the authority of the court; but the inadequacy of the consideration, or the total want of consideration, would not make a judgment void at law. This rule of court applies only to cases where the judgment is not to be entered up absolutely, but only in certain contingencies; but in this case there was no agreement made restraining the use to be made of this judgment; it was given for the very purpose that the plaintiff might, by sale of the defendants' goods, and out of the proceeds, raise money to discharge his own liability.

*Lens* and *Vaughan*, Serjts. *contra*. This warrant of attorney is, from the nature of the transaction, subject to a defeazance; namely, that if the defendants should take up the bills accepted by the plaintiff, he should not enter up judgment. It was never intended that the money should be levied in all events. The debt, too, when it should be incurred, only by a little exceeded 5000*l.*; the judgment was for 10,000*l.*; the disparity shews it was

1811.

BARBER  
v.  
BARBER.

[ 467 ]



1811. was intended to be defeazable on payment of the bills, and therefore the plaintiff was bound to wait \* until he saw whether the defendants would pay the bills or not, before he could enforce his judgment, and there was a tacit defeazance on payment of the 5152*l.* 6*s.* 2*d.*

BARBER  
v.  
BARBER.  
[ \*468 ]

MANSFIELD, C. J. Could it be said that the plaintiff was not at liberty, on this warrant of attorney, to enter up judgment the next hour after it was given? The plaintiff's paying the bills, in case the defendants should not provide for them, was the consideration of the warrant of attorney, but it does not follow that the converse should be a defeazance of it. It may not be improper so to enlarge the terms of this rule of Court, as that in future the consideration, as well as the terms of defeazance of every warrant of attorney, should be expressed on the back thereof, but the rule is not now so. The circumstance which has happened shews the necessity of the plaintiff's taking such a security; for he gave the acceptances to save his brothers from bankruptcy; he was conscious that he was absolutely liable to the payment of the 5152*l.* on the bills; the creditors might sue out a commission, and therefore it was necessary he should be prepared with his judgment, that if he should hear any rumour of such an intention, he might sue out execution instantly. It is impossible to say this was a defeazance. There is no fraud on the creditors, nothing dishonest, nothing wicked, nothing imprudent. If the plaintiff had levied more than the amount of the bills he had paid, the Court would set aside the execution as to the surplus; but there is no reason here why we should deprive the plaintiff of the advantage he has got at law.

Rule discharged.

[ 469 ]

ANONYMOUS.

May 11.

An affidavit having only one stamp cannot be used in more than one cause.

IN four causes the affidavits were each of them entitled in all the four, but there was only one stamp on each affidavit.

Best, Serjt. objected that they could not be read, because no indictment for perjury could be sustained on them for want of sufficient stamps to enable them to be given in evidence.

The Court held the objection fatal, but permitted Clayton, Serjt., who was opposed to him, to amend by striking out three of the names, and forthwith reswearing the affidavits in the fourth cause, which made them good affidavits in that cause.

BIRCH

1811.

## BIRCH and Others v. STEPHENSON and Others.

May 11.

**COVENANT.** The declaration stated that Lord *Colerane*, being seised in fee, by indenture of 19th July 1728, demised to *Ralph Harwood*, his executors, administrators, and assigns, amongst other premises, all those three pieces or parcels of meadow ground commonly called or known by the name of *Harwood's parks*, formerly woodland, with the appurtenances, lying in the parish of *Tottenham*, (except as therein is excepted,) to hold the same (except as thereinbefore excepted) unto *Harwood*, his executors, administrators, and assigns, from the feast of the *Annunciation* then last past, for the term of 98 years, under the yearly rent of 30*l.*, on the four feasts of *St. John the Baptist*, *Michaelmas*, *Christmas*, and the *Annunciation*, and yielding and paying therefore during the last 20 years of the term; unto Lord *Colerane*, his heirs and assigns, at the place and on the four feast-days above limited for payment of the yearly rent of 30*l.*, the further yearly rent or sum of 5*l.* for every acre of meadow or pasture ground thereby leased, which *Harwood*, his executors, administrators, or assigns, or any of them, should plough, dig, break up, ear, or convert into tillage, or permit or suffer to be ploughed, digged, broken up, eared, or converted into tillage, during the said last 20 years of the term, and so after the same rate for any greater or lesser quantity than an acre, or for any less time than a year. And *Harwood* for himself, his executors, administrators, and assigns, and for every of them, covenanted with Lord *Colerane*, his heirs and assigns, to pay the rent of 30*l.* yearly and every year during the term of 98 years, and also the rent or sum of 5*l.* for every acre of the meadow or pasture ground thereby leased, which should be so ploughed, digged, broken up, eared, or converted to tillage at any time during the last 20 years of the term, on the several days and times, and in such manner and form as was therein limited and appointed for payment thereof, according to the true intent and meaning of the several *reddendums* or reservations aforesaid; the plaintiff then averred the lessee's entry, and deduced title to the reversion to the plaintiffs, and averred that on the 30th of November 1807, at *Tottenham* aforesaid, the estate of *Harwood* in the premises, by assignment thereof made, legally came to and vested in the defendants, who entered

Reservation of 5*l.* per acre during the last 20 years of a term for every acre of meadow there-

[ 470 ]  
by demised, which the tenant should plough, dig, ear, break up, or convert into tillage during the said last 20 years of the term, and so after that rate for any greater or less quantity than an acre, or less term than a year. The rent is due in the last 20 years if the land is then ploughed, whether it was first ploughed within the last 20 years or before, and the rent continues payable during the 20 years, though the land be again laid down to permanent grass.

Land sown to clovers with corn is not thereby restored to a state of permanent pasture, but is still in tillage.

If a lease describe demised land as meadow land, no other evidence is necessary to prove that it was meadow land at the commencement of the term.

[ 471 ]

1811.  
 BIRCH  
 v.  
 STEPHENSON.

entered and were possessed, and averring performance by the plaintiffs from the time they became so seised of the reversion, yet, protesting that the defendants had not, since they became so possessed of the premises, observed any thing in the lease contained on the part of the lessee, the plaintiffs alleged for breach, that after the sealing of the lease, and during the term, and whilst the plaintiffs were so seised of the reversion, and the defendants were so possessed of the premises, and within the last 20 years of the term, and before *Christmas-day* 1807, old style, to wit, on the 24th day of *December* in that year, the defendants did plough, and permitted and suffered to be ploughed, divers, to wit, 65 acres of the said pieces of the meadow-ground called *Hawke's parks*, which ground at the time of the making of the lease was meadow and pasture ground of the demised premises, whereby, and according to the tenor and effect of the lease, and the covenant of *Harwood* so by him made for himself and his assigns with the lessor and his assigns, the defendants afterwards, to wit, on the feast-day of the nativity of *St. John the Baptist* 1809, old style, became liable to pay to the plaintiffs 487*l.* 10*s.*, being at and after the rate of 5*l.* a-year for one year and an half of the term, ending on the same feast-day in that year, for each of the said 65 acres of the said meadow and pasture ground of the demised premises, so by the defendants ploughed, and had neglected to pay the same. The defendants pleaded in bar of the action, that before and at the time of the commencement of the last 20 years of the term, the 65 acres of ground so ploughed, and permitted and suffered to be ploughed, as in the declaration was alleged, were ploughed, dug, broken up, and in tillage, and continually from thenceforth until the time when the same were ploughed by the defendants, as in the same declaration mentioned, continued to be and were in tillage, and were not, nor was any part thereof, during any part of the same last 20 years of the term, until or at the time of their ploughing the same as aforesaid, meadow or pasture ground of the demised premises. And for further plea, as to 243*l.* 15*s.*, part of 487*l.* 10*s.*, being at and after the rate of 5*l.* a-year for the last three quarters of a-year, part of the said one year and a half of the said term ended on *St. John's-day* 1809, old style, for the 65 acres of meadow and pasture so alleged to be ploughed by the defendants, they pleaded, that they did not, within or during the same three quarters of a year, plough, or permit or suffer to be ploughed, the same 65 acres of meadow and pasture

[ 472 ]

or any part thereof, nor had or continued the same, or any part thereof, in tillage, in or during all or any part of that time. And thirdly, they further pleaded, as to the same part of the same sum, for the same time, and acres, that they the defendants, before *Michaelmas-day* 1808, old style, to wit, on the 24th day of *December* 1807, and on divers other days and times between that day and the last-mentioned feast-day, sowed the same 65 acres of meadow and pasture ground so ploughed by them as aforesaid with *clover*, and had continued the same in and so sowed with *clover* from thence hitherto, and that they had not at any time since the feast-day had or continued the same, or any part thereof, in tillage. The plaintiffs demurred to the first plea, joined issue upon the second, and replied to the third plea, that the defendants, since *Michaelmas* 1808, old style, until the feast of *St. John the Baptist* 1809, old style, had and continued the premises in tillage. The defendants joined in demurrer, and the last issue.

*Best*, Serjt. in *Easter* term 1811 was heard in support of the demurrer. The construction contended for by the defendant is, that if the whole of the meadow land had been ploughed up 20 years and one day before the end of the term, the defendants might continue it in tillage during the residue of the term, without any increase of rent, which is totally opposite to the lessor's intention.

*Sellon*, Serjt., *contra*, contended, that if the whole of the land had been ploughed up more than 20 years before the expiration of the term, the over-rent was not intended to attach, although it should be continued in tillage. This was a peculiar case. The term was so long, that the tenants had a sufficient interest to induce him to make the most profitable and valuable application of the land for the first 78 years; the lessor, therefore, knew that he could rely on the tenant's judgment and sense of his own interest, to discover what that most valuable application of the soil would be, whether to tillage or pasturage, and he knew that whichever was the most profitable to the tenant for the first 78, would be the most valuable to the reversioner to be continued for the last 20 years: all he meant, therefore, to provide for, was, that no change detrimental to the lessor should be introduced during the last 20 years, but that the state of the property which skill and experience of the land had previously proved to the tenant to be most beneficial, and which would therefore be spontaneously adopted during the greater

1811.

BIR. H

STEPHENSON.

[ 473 ]

1811. part of the term, should be continued during the latter end of the term for the lessor's benefit. There would be great hardship attendant on a different construction: for an assignee, taking the term after 70 years, has no means of knowing which acres were in pasture at the commencement of the term, and may subject himself to over-rents to an enormous extent. This, too, is in the nature of a penalty, against which the tenant may be relieved. [474] *Mansfield, C. J.* You must enforce that argument in a court of equity, it cannot be listened to in a court of law; but a very great authority in a court of equity has said, that a reservation of 100*l.* per acre for ploughing pasture land, is not a penalty.] If the assignee is not the first person who ploughed up this land, he did not convert it to tillage, and is not therefore within the breach, nor subject to the increased rent, for those words can apply only to the first act of breaking up. The defendant is in by an under-lease, and had no notice of the covenant.

*MANSFIELD, C. J.* Really, Brother, on the words of this covenant there is no doubt; we cannot tell exactly what was the reason of inserting this *reddendum*, but we may suppose the lessor thought it would be clearly more advantageous to the lessee to let the pasture lie till towards the end of the lease; but that he might be tempted in the latter end of the term, by the immense profits attending new broken land, to pursue a course, for his own profit, which would be injurious to the inheritance: but we cannot speculate upon the reasons which induced the parties to enter into this contract; we must be bound by the words which are, "the meadow or pasture ground hereby leased." It is argued that the meaning is the same as if the parties had said, "which shall be meadow or pasture at the commencement of the last twenty years:" if they had meant that, it would have been very easy to have said, any land which shall be meadow or pasture at the commencement of the last 20 years of the term. That would, however, have been a very improvident contract on the lessor's part; for the tenant would have had nothing to do but to begin ploughing, no longer before the commencement of the last 20 years, than would suffice him to pass the plough over the whole of the meadow and pasture ground before the last 20 years begun. [475] The case has been argued as if the words were, plough, dig, ear, and convert into tillage; and it has been said there could be no breach unless it were the defendant who converted it into tillage; but the words are,

are, plough, dig, ear, or convert into tillage, and we cannot substitute new words for those which the lessor has used. And even if that were not the motive for inserting this covenant which I have supposed, but if it were in the lessor's mind that the lessee might be at liberty to plough it all up during the first 78 years of the lease, then this reservation would operate to compel the tenant to let all which was ever meadow at the time of the demise, be pasture again for the last 20 years.

1811.

BIRCH  
v.

STEPHENSON,

HEATH, J. I agree with my Lord in the construction of this *reddendum*: it precludes the tenant from ploughing during the last 20 years, whether the land was first ploughed before the beginning of the 20 years or after, the words ear, plough, &c. apply, if the pasture land had begun to be ploughed before the 20 years, and the words "convert to tillage" apply, if the pasture land first began to be ploughed afterwards. The value of the reversion of tillage land is much less than of pasture land, which is a sufficient reason why a lessor should insert such a covenant.

LAWRENCE, J. I am of the same opinion. I agree with my brother *Sellon* that it was a matter indifferent to the lessor what was done during the first part of the lease, so long as his reversion was not injured; therefore, he says, you may do what you will during the first period, but whatever was meadow when I demised, must be meadow for 20 years before I take it back, that I may receive it in the state of ancient meadow.

CHAMBRE, J. There is no sort of ambiguity whatever in these words: they are alternative: the first words, ear, plough, dig, &c. apply to the case of the meadow land being ploughed up before the last 20 years of the term, the other words provide for a beginning to plough up during the latter part of the term. It is perfectly well known that the value of the inheritance of tillage land is much less than of meadow land. There is no doubt or question upon the case; the lessor has chosen to use these words, and we cannot vary them.

[ 476 ]

Judgment for the plaintiff.

*Shepherd*, Serjt., in support of the demurrer, and *Lens*, Serjt., in support of the plea, took notes for a further argument, but the Court refused it.

The issues were tried at the *Westminster* sittings after *Trinity* term 1811 before *Mansfield*, C. J., when the evidence was, that the closes mentioned in the declaration had been in tillage for about 40 years past: and no evidence was given, except the lease,

1811.  
 BIRCH  
 v.  
 STEPHENSON.

[ 477 ]

lease, of their having ever been in any other state. They were ploughed in 1807, and bore corn at the harvest 1808, with which corn red clover and white clover were sown, and two crops of hay were cut from the clover in 1809; the land had not been since ploughed, in consequence, as it appeared, of the tenant's apprehension of the present action. It was proved by a person of skill that a good farmer, intending to lay down arable land to permanent pasture, would not have proceeded by sowing merely clovers for that purpose. The witness considered it as land still in tillage, although it had not been since ploughed. *Lens*, Serjt., for the defendant, contended, that the land had not been and was not now continued in tillage; and that he was therefore entitled to a verdict on these issues. He also made a point, which did not arise on the record, that if the land was not continued in tillage, the over-rent would cease. *Mansfield*, C. J. was clearly of opinion, that the rent would remain payable during the residue of the term, whether the land continued in tillage or not; but held that the evidence did not prove that the land ceased to be in tillage; and directed the jury that so long as the land remained in corn, or in clover sown with the corn, it was in a state of tillage. In order, however, to enable the defendants to raise this question, it was agreed by the plaintiffs, that it should be found for the defendants that, as to one acre, they had laid it down to permanent pasture for the last three quarters of a year stated on the record; and as to the residue the jury found a verdict for the plaintiffs, with liberty for them to move to increase their damages by entering up judgment *non obstante veredicto*, for the three quarters' rent of the other acre, in case the Court should be of opinion that the laying down that land to permanent pasture did not extinguish the increased rent thereof.

Accordingly *Shepherd*, Serjt. having on a former day in this term obtained a rule *nisi* to increase the damages, (upon which occasion the Court agreed that the plaintiffs might well have demurred to the two last pleas,)

Nov. 22.

*Lens* and *Sellon*, Serjts. on this day shewed cause: they contended that the over-rent was to be payable only so long as the plough was going, and called in aid of their construction the words of the *reddendum*, that the rent was to be "after that rate for any less time than a year" that the land might be in tillage.

[ 478 ]

*Shepherd* and *Best*, *contra*, applied this expression to the contingency of the tenant breaking up some of the land, at a time when  
 less

less than a year of his term might remain unexpired; admitting that the lessor had so far made an improvident contract, as it would permit a tenant to scourge pastures of a century's preservation with an exhausting summer crop, while there was less than a single year's over-rent reserved in that case to compensate the lessor for the destruction.

*The Court* held it to be clear, that laying down the land to permanent grass again, would not protect the lessee from the future accruing over-rent, and made the

Rule absolute.

1811.

BIRCH

v.

STEPHENSON.

THOMAS v. RHODES (a).

May 14.

A Second commission of bankrupt, (a first having been superseded for want of evidence of the act of bankruptcy,) issued against the defendant on the petition of the plaintiff, whereon the defendant was adjudged a bankrupt, and the plaintiff and other persons proved debts under the commission to a considerable amount, and the plaintiff and *Lever*, a creditor, were chosen assignees under that commission, and empowered *Gray* to take the defendant's goods, under which authority *Gray* did take them. The defendant thereupon commenced an action in this Court against *Gray* for so doing, which action was defended for *Gray* at the expense of the plaintiff and by his attorney, being the solicitor to the commission, and upon the trial, before *Mansfield*, C. J., the defendant obtained a verdict for the value of the goods, subject to leave to move for a new trial. In *Trinity* term 1809 a motion was made, and a rule *nisi* obtained for a new trial, and in the following vacation, pending that rule, a treaty of compromise took place on the behalf of the defendant and the plaintiff without the knowledge of *Lever*, the other assignee, and without the knowledge of any of the creditors of the defendant, who had proved debts under that commission, except the plaintiff; in pursuance of which treaty, an agreement was entered into, and signed by the plaintiff, defendant, and *Gray*, on the 26th day of *October* 1809, the original of which agreement was left in the hands of the plaintiff; and at the same time the defendant executed a warrant of attorney, to confess judg-

A bankrupt, who had brought an action to try the validity of his commission, and obtained a verdict pending a rule to set it aside, secretly confessed judgment to one of his assignees who was the petitioning creditor, for a sum of money in

[ 479 ] discharge of his debt and the costs of the action, in consideration of the petitioning creditors consenting not to oppose the bankrupt's petition for a *supersees*. The Court set aside the judgment, on the bankrupt's application, on 5 Geo. 2. c. 30. s. 24.

(a) *Chambre*, J. was absent on this day in consequence of indisposition.

ment



1811.

THOMAS  
v.  
RHODES.

[ 480 ]

ment at the suit of the plaintiff, for 400*l.*, subject to a defeazance. The agreement recited that *Gray*, by the authority of the assignees under the commission, had taken away divers goods of the defendant, and then had the same in his possession, and that a verdict had been obtained in the action by the defendant against *Gray* for 65*l.*, the reputed value of the goods, and costs, and that if the verdict should stand, the legality of the commission would be negatived, but that *Gray* had obtained a rule *nisi* for a new trial in that action, whereby the application of the defendant to the Lord Chancellor, to supersede the commission on the footing of that verdict, was necessarily deferred till next term; and that to obviate that, and other difficulties and inconveniences, and to put an end to various litigations and disputes, the defendant and the plaintiff, the petitioning creditor for the commission, had that day come to an account, in which the plaintiff had credited the defendant a sum of money as the estimated amount, and in full discharge of his costs of the action against *Gray*, and recited, that all other just allowances of debts and credits, for costs and otherwise, had been made between the defendant and the plaintiff, and that the liquidated balance in favour of the plaintiff was 200*l.*, which the defendant, by the direction of the plaintiff, thereby signified, had that day secured to be paid by a warrant of attorney bearing even date, (and which warrant of attorney the plaintiff thereby declared to be in full satisfaction and discharge of all his demands on the defendant, and on his estate and effects,) and it was thereby declared and agreed between the three parties, that the goods should be restored to the defendant, and should be conveyed at the expense of *Gray* to the defendant's dwelling-house within six days, and which goods should be accepted and taken by the defendant in full satisfaction and discharge of the 65*l.* damages; and that the action should be no further prosecuted; and it was further agreed that the commission should be superseded on the petition of the defendant for that purpose, without any opposition to be made by the plaintiff, but who, on the other hand, should do every thing in his power to forward and effect the *supersedeas*: and lastly, that in case either from the interference of *Lever*, the other assignee, or other creditor or creditors, or otherwise, the Lord Chancellor should refuse to supersede the commission on the petition of the defendant, (such proceedings for the *supersedeas* to be forthwith prosecuted by the defendant or his solicitor, and in no ways neglected,) then the warrant of attorney

torney should be null and void, and should be delivered up to be cancelled, and that *Gray* should be liable to the costs of that action, to be taxed; but with respect to the 65*l.* damages, given by the jury, *Gray* was, on the restoration of the goods, within the time and manner aforesaid, wholly released and discharged therefrom.

1811.

THOMAS  
vs  
RHODES.

[ 481 ]

The defeazance on the warrant of attorney, stated that it was giving for securing the payment of the sum of 200*l.* and interest, to be paid, as to 33*l.* 6*s.* 8*d.*, part thereof, on the 26th day of *October* 1810, and the remaining sum of 166*l.* 13*s.* 4*d.*, by quarterly payments of 8*l.* 6*s.* 8*d.*, each then next following; that sum of 200*l.* being a balance of the sum of 401*l.* due from the defendant to the plaintiff, after allowing what money the plaintiff might have received under the two commissions issued against the defendant, or that might be due from the plaintiff to the defendant, and after allowing all costs, charges, damages, and expenses that the defendant or his solicitor might have, or claim, against the plaintiff or *Gray*, or either of the assignees under the two commissions issued against the defendant, or any costs or charges the defendant or his solicitor might have or claim against the plaintiff, *Gray*, or the assignees under the two commissions, for any proceedings that had already been had, or might hereafter be had, under or by virtue of any petition, order, action, judgment, or in any wise however, the plaintiff not opposing the defendant's applying for and superseding the last commission against him by the plaintiff. But that no judgment was to be entered up or execution to issue against the defendant, till default should be made in payment of some one instalment of the sum of 200*l.*, and in case of such default execution should issue only for the instalment or instalments due, and not for the whole remaining debt, together with the cost of the judgment on the first levy, and the costs of the execution and officer on every such levy; and the judgment, if entered up, was to stand without being revived till the whole of the principal and interest should be fully paid off and satisfied. The defendant afterwards presented a petition to the Chancellor to supersede the commission, on the ground of the verdict against *Gray*, with which petition the plaintiff was duly served, and which came to a hearing in due course, and no counsel or solicitor appearing for the plaintiff, His Lordship, by his order, dated the 10th of *March* 1810, ordered the commission to be superseded accordingly. The plaintiff having

[ 482 ]

1811.  
 ———  
 THOMAS  
 v.  
 RHODES.

entered up judgment on the warrant of attorney, and executed a writ of *feri facias*, and a writ of *capias ad satisfaciendum*, on which writs the defendant had paid into the hands of the Sheriff of *Middlesex* sums amounting to 53*l.* 10*s.* *Pell*, Serjt. had on a former day obtained a rule *nisi* that the judgment might be vacated, and that the several writs of execution issued and executed thereon might be quashed, and that the sum of 53*l.* 10*s.*, paid by the defendant into the hands of the Sheriff of *Middlesex* might be returned to the defendant.

*Best*, Serjt. now shewed cause: he contended that the statute 5 G. 2: c. 30. s. 24. would not assist the defendant in this case; that statute, he said, as was manifest from the preamble, was made for the benefit of creditors, and if this application had proceeded from a creditor who had been hindered of his debt by this transaction, there might have been some colour for the application: but this motion originated with the bankrupt himself, who being party to the fraud, if it were a fraud, so far as related to the interest of the other creditors, both he and the plaintiff were *in pari delicto*, and the Court would not assist him. Transactions, fraudulent as they respect others, are good as between the parties, and it was not competent to the defendant to impugn the security he had given, after having reaped the fruit of his act.

[ 483 ]

*Shepherd*, Serjt. and *Pell* in support of the rule. The preamble of the section shews that the act was made as well to protect the bankrupt himself from oppression, so that no advantage might be taken of the hardship of his situation, as to protect his property from an undue application. The process of the Court is here put in force, if not illegally, yet unduly, and the Court will therefore interfere to set it aside. The accord of the plaintiff to the *supersedeas*, by not coming in to oppose it, is, itself, a fraud on the rights of the other creditors and the justice of the country.

MANSFIELD, C. J. This case is a little singular in its circumstances. The bar have not found, nor do I know, any case exactly similar. But it is plain that the legislature thought, and all must concur in that opinion, that it is wrong that any man suing out a commission, should gain an advantage to himself, in which all the creditors do not share. Here, the first commission was superseded by order of the Chancellor, (there not being evidence then to support it,) and a second commission being sued out, it is a doubt, whether, on the verdict, it could

could be supported; the plaintiff was the petitioning creditor and assignee; it was his duty to support the commission if it possibly could be supported. This second commission is taken out on the same debt, due to the same petitioning creditor, on the same act of bankruptcy. What then does the petitioning creditor do? After receiving his dividends *pari passu* with other creditors, he puts 200*l.* in his pocket, thus applying to his own use the other creditor's money; for it is stated that the 200*l.* is a balance due to him after the sums he has received. It appears therefore that he consents to superseding the commission upon having that sum of 200*l.* secured to him by warrant of attorney. This gave the plaintiff, as a creditor, an extraordinary advantage, for it not only deprives the others of their dividends under the commission, but puts the plaintiff in a very favourable situation for securing his own debt, to the exclusion of the other creditors; therefore it is fit that the judgment and execution should be set aside.

HEATH, J. I am of the same opinion. This transaction is bottomed in fraud with respect to the other creditors, and in oppression with respect to the bankrupt.

LAWRENCE, J. I do not think the circumstance of the application being made by the bankrupt, makes any difference; for the act was made for the protection of bankrupts.

Rule absolute.

1811.

THOMAS  
v.  
RHODES.

[ 484 ]

### DE ROUFIGNY v. PEALE.

May 14.

THIS cause had stood first in the cause-paper for trial at a sittings in term; when the cause was called on, the defendant's attorney had delivered no brief to his counsel, although he had had a consultation with him the preceding night; and the cause being thus undefended, a verdict passed for the plaintiff. Soon after the verdict had been recorded, the defendant's attorney came into Court with a brief to instruct his counsel to defend the cause.

Vaughan, Serjt. now moved to set aside the verdict, and have a new trial, on payment of costs.

The Court held, that it would be only encouraging the negligence of attorneys, to grant such an indulgence, in the ordinary way, at the client's expense; attorneys ought to know that they

VOL. III.

A a

are

If a cause, which is meant to be defended, is called on, and tried as an undefended cause, in consequence of the defendant's attorney neglecting to deliver his briefs, the Court will grant a new trial, compelling the defendant's attorney to pay the costs, as between attorney and client, out of his own pocket.

1811.

DE ROUIGNY

v.

PALE.

[ \*485 ]

are amenable to their clients \*for the consequences of such neglect; neither would it be putting the plaintiff in the same situation if they were to grant the rule on the payment of costs between party and party: they therefore granted a rule *nisi*, which on a subsequent day was made absolute, for a new trial, upon payment by the defendant's attorney, out of his own pocket, of all costs as between attorney and client.

May 15.

DOE, on the Demise of PRIOR and WIFE, v. SALTER.

The only mode of recovering the costs of a nonsuit upon the merits in ejectment, is to serve the lessor of the plaintiff with a copy of the consent-rule, and *allocatur* of costs, and to attach him if he does not obey.

LENS, Serjt. moved for an attachment against the lessor of the plaintiff, for not paying the costs of the nonsuit, which had passed upon the merits, in this ejectment: he moved upon an affidavit that a *capias ad satisfaciendum* had been sued out against the nominal plaintiff, and served on the lessors of the plaintiff, and as they had not paid the costs upon sight of that writ, and the *allocatur* of costs, it was conceived they were now in contempt.

The Court held that the only mode to get the costs of a nonsuit, which proceeds upon the merits, in ejectment, is to serve the party with a copy of the consent rule, and *allocatur* of costs; after which, an attachment may issue; and MANSFIELD, C. J. expressed a hope, that nothing so absurd as a *capias ad satisfaciendum* against the nominal plaintiff would ever again be heard of.

Rule refused.

[ 486 ]

May 18.

FILMER v. DELBER.

After an order of reference has been made with the consent of counsel and attorney, the Court will not set it aside on an affidavit by a party expressly denying his attorney's authority to refer; though the application be made before any step taken by the arbitrator, excepting the appointment of a meeting,

CLAYTON, Serjt. moved to set aside an order of *nisi prius* by which this cause had been referred to a barrister, on an affidavit by the defendant, stating that she had expressly desired her attorney not to consent to any rule of reference. No step had yet been taken by the arbitrator, excepting that he had appointed a distant day for a meeting, in order to give time for this motion. In answer to a question by the Chief Justice whether there was any precedent for the Court's interference in such a case, Clayton, Serjt. cited the case of *The Mayor of*

*Morpeth*

*Morpeth v. Lord Carlisle*, ante, 378., where the Court intimated that an application might be made to them to vary the terms of the rule of reference.

MANSFIELD, C. J. That was where it was thought that the intention of the parties had been misunderstood; but here is an express agreement to refer properly entered into by counsel and attorney; it is now said that they had no authority to enter into that agreement; if so, the defendant's remedy is by action against her attorney. There would be no end to these applications if the Court were to interfere; such interference would lead to collusion; when a party did not like the prospect of the reference, he would say that he had never given his attorney authority to refer.

— Rule refused.

1811.

FILMER  
v.  
DELBER.

THACKTHWAITE v. Cock and Others, Assignees of  
Moore a Bankrupt.

[ 487 ]  
May 20.

THIS was an action of trover for hops. Upon the trial of this cause at *Guildhall*, at the sittings after *Michaelmas* term 1810, before *Mansfield*, C. J., the case appeared to be, that the plaintiff, in *November* 1808, purchased 78 pockets of hops, the goods in question, of *Moore*, who was a hop-merchant, and paid for them, and agreed with him that the hops should remain in *Moore's* warehouses at the rent of a penny a pocket *per* week until the plaintiff should think it advantageous to re-sell them. In 1810 *Moore* became a bankrupt, and his assignees, finding these goods on the premises, and conceiving these hops to be goods in the ordering and disposition of the bankrupt, within the statute 21 *Jac.* 1. c. 19. s. 11., refused to deliver them to the plaintiff. The plaintiff endeavoured to take the case out of this statute, by proving a custom of the trade for purchasers of hops to permit their hops to remain upon rent in the hop-merchants' warehouses: one witness had known hops to remain five years, and another nine years, in that manner, and all the witnesses spoke to the frequency of the practice. The bankrupt, being called as a witness, stated, that when the plaintiff made his purchase, he had asked of the witness, whether it was not usual to leave the goods on rent in the same warehouse, who answered that it was; he admitted, how-

A custom that purchasers of hops from hop-merchants shall leave them in the merchant's warehouse for the purpose of resale, upon rent, undistinguished from the merchant's stock, is not such a custom of trade as will prevent the hops from becoming the property of the merchant's assignees, in case of bankruptcy, as being in his possession, order, and disposition.

1811.

THACKTH-  
WAITE  
v.  
CACK.

[ 488 ]

ever, that he had seldom known any left so long as these. The hops were exposed to the view of persons coming into the warehouse to purchase, promiscuously with the other goods of the bankrupt; they were not distinguished by any conspicuous mark from *Moore's* goods, because any thing that would draw attention to the length of time they had been on sale, would hurt the sale of them. No rent for warehouse room had been charged or received before the time of *Moore's* bankruptcy, but an offer to pay had been made by the plaintiff to the assignees. The jury found a verdict for the plaintiff, with one shilling damages, the defendants undertaking to deliver the hops.

*Lens*, Serjt. having in the last term obtained a rule *nisi* to set aside the verdict and enter a nonsuit.

*Shepherd* and *Best*, Serjts. in this term shewed cause. They first observed, that the form of the rule was wrong, for that if the defendants succeeded, they would be entitled only to a new trial, not to enter a nonsuit. They contended that as *Moore* had no general authority from the plaintiff to sell these goods, but merely held them upon rent, he had not the possession, order, and disposition of them as owner, neither did he take upon himself the sale, alteration, or disposition of them as owner. The words in the statute were all connected by a copulative, not by a disjunctive, conjunction, and it was therefore necessary, that the bankrupt should have all of these to bring the case within the statute: *Moore* had none of them except the mere possession: he was a mere warehouse-keeper, and came neither within the words or the spirit of the act; for the custom of the trade being known, the possession of the goods could not induce others to give that credit, which constituted the mischief intended to be remedied by the act. The mere possession of the goods, if reconcilable with any other purpose than the ordering and disposition of them by the bankrupt as owner, does not bring the case within the act; and this feature forms an important distinction between the present case and that of *Horne v. Baker*, 9 East, 215.; but even there, *Le Blanc*, J. threw out, that if there were a custom of the trade, it would take the case out of the statute.

[ 489 ]

*Lens*, Serjt. *contra*. The visible ownership of these goods was in *Moore*, and it was proved that if there had been any mark to distinguish them from *Moore's* goods, the very object of leaving them with him would have been defeated, which was, to give them the appearance, in the eye of customers, of being part

of *Moore's* stock; for if it had been known that they had been so long in hand, it would have hurt the sale of them; nor would they sell so well, if it were known they were there on account of another person. This secret mode of dealing is therefore directly within the statute. *Moore* is not a factor, but a merchant. In *Horn v. Baker*, the sort of usage alluded to was a practice of letting distillers' utensils for rent; but that is a very different case from an usage to leave goods intended for sale in a warehouse undistinguishable from the goods of the merchant. As to the argument drawn from the copulative particle in the act, if that be well founded, no goods of another can ever in any case belong to the assignees; for the law is not to attach unless the bankrupt shall have completed all the acts mentioned in the statute, one of which is the sale, and if that is completed, of course the assignees cannot afterwards have the goods, so that the act would by this construction be rendered totally insufficient. And whether the bankrupt could, as between himself and the plaintiff, have sold these goods or not, that cannot affect the law of bankruptcy, and the rights of creditors, so long as the goods were purposely made undistinguishable from the bankrupt's property, that it might not be supposed they were the goods of a person necessitated to sell. The bankrupt had, besides, another warehouse, not so open to inspection; but these goods were kept among his saleable stock. Persons who came to buy his own hops, saw these hops too.

In the course of the argument, MANSFIELD, C. J. expressed his opinion that the authorities extant were wholly inconsistent with, and an answer to, the argument drawn from the conjunction in the act being copulative and not disjunctive. He had never before known the question made, that it was necessary to prove some act of disposition of the deposited goods, much less that the bankrupt must exercise all the acts mentioned in the statute, before the goods can become part of his stock.

LAWRENCE, J. observed, in the course of the argument, that what was said in the case of *Horn v. Baker*, chiefly respected pieces of machinery, vats, and other similar utensils, which in their nature resembled fixtures; but that loose vessels, of which it is usual for the possessors to be the owners, were goods within the disposition of the bankrupt. In the counties of *Nottingham* and *Leicester*, it was extremely common for the working hosiers to have on hire the possession of stocking frames, valuable machines, which they were unable to purchase, and which came

1811.

THACKTH-  
WAITE  
v.  
COCK.

[ 490 ]



1811.

THACKTH-  
WAITE  
v.  
COCK.

came within the reason of job carriages, job horses, and the like.

CHAMBRE, J. observed, that in *Horn v. Baker*, reliance was placed on the circumstance, that two out of three former owners had continued in possession, the third having retired, which, the Court thought, 'was quite sufficient to give the reputation of ownership.

MANSFIELD, C. J. delivered the opinion of the Court.

[ 491 ] It seems to the Court, and the more I consider it, the more I am strengthened in that opinion, that though the custom of a trade may have the effect referred to in *Horn v. Baker*, it must be a custom much more clearly proved than this is, and must be such a custom, that persons dealing with the traders may see and know that the goods may possibly not be the property of the possessor. Here is a custom to put no mark on the hops, so that no person may perceive or know that they are not the property of the seller. The reason is, that after hops have laid a year, they deteriorate; and therefore if *A. B.*, or any other ear mark, were visible, it would hurt the sale when that mark got old and known; and therefore they are not to be distinguished from the common stock of the seller. There is not, therefore, such a clear, distinct, and precise custom proved, as would enable others to see that these may not be the hops of the possessor. The custom is, to let hops which are sold remain in such a manner, that it may not be known that there has been a sale. The objection against disclosing the real owner would be easily obviated, by having a separate warehouse, marked as a warehouse for hops held there for the benefit of the persons who had bought them. I therefore think the verdict is wrong; and it is unnecessary to grant a new trial, because I have no idea of any evidence that can be given, consistently with the evidence given in this case, that could prove any such custom as is requisite to support this action. There must therefore be a

Rule absolute for a nonsuit.

1811.

## CLARKE and Another, Executors of LENNARD, v. GORMAN.

May 20.

**B**EST, Serjt. had on a former day moved that the defendant's attorney might pay the plaintiff his debt and costs, and the costs of that application, upon an affidavit of Mr. Joseph Hill, the plaintiff's attorney, that the defendant's attorney had put in no bail in that cause, but had nevertheless sued out a *superseas*, and had discharged the defendants out of custody. The Court, considering this as a gross abuse of their process, granted a rule *nisi*.

Shepherd, Serjt. now shewed cause, whereupon it appeared, that the defendant's attorney had served notice of bail, who actually justified, and the defendant applied for and obtained the allowance of bail; but what Mr. Joseph Hill meant by swearing that there were no bail in that cause was, that the defendant's attorney had given in to the filazer the name of *Henry Henman* instead of *Edward Henman*, as one of the plaintiffs, who were nevertheless described as executors of *Lennard*.

Best, in support of his rule, admitted that he had himself been misled by the nice wording of the affidavit, to suppose that no notice at all of bail for the defendant had been given by his attorney; but though he had misconceived that fact, the affidavit was legally true; for there were no bail in the cause of *Clarke* and *Edward Henman* against *Gorman*.

MANSFIELD, C. J. The affidavit is grossly false in substance: no honest man would have sworn to it.

The Court discharged the rule with costs, to be paid by the leponent.

The defendant in putting in bail, misinstructed the filazer as to the Christian name of one of two plaintiffs: the plaintiff's attorney thereupon swore that there were no bail in that action, and moved that the defendant's attorney might pay debts and costs for superseding the defendant. The Court discharged the rule with costs, to be paid by the attorney so swearing.

[ 493 ]

## FOY v. BELL.

May 21.

**T**HIS was an action upon four policies of insurance, effected by A. Gordon, as agent for the plaintiff, upon the ships *Vigilant*, *Paradise*, *Friede*, and *Flora*, from various Northern ports to England: the plaintiff claimed a loss upon the *Vigilant*

script of the premium, is estopped from afterwards claiming the premium against the assured, yet where, by the fraud of the assured, the underwriter is induced to give credit for the premiums to the broker, and the broker to give credit to the assured, the underwriter is entitled to receive the premiums from the assured.

Although generally an underwriter having subscribed a policy, and thereby confessed the

of

1811.

FOY  
v.  
BELL.

[ 494 ]

of 99*l.* 4*s.* 4*d.* *per cent.*, amounting upon the defendant's subscription to 297*l.* 13*s.*; and a return of ten *per cent.* upon the defendant's subscriptions on the other ships, for convoy and arrival, amounting to 90*l.* more; making together the sum of 387*l.* 13*s.* The defendant gave notice of set-off for the premiums upon these very policies, and for the premium of another policy effected by the plaintiff through the same agent with the defendant on the ship *Wilhelmina*, together amounting to 582*l.* 15*s.* Upon the trial of the cause at the *London* sittings after *Hilary* term 1811, it appeared that the plaintiff, who resided at *Pillau*, procured *A. Gordon*, who was a young man just embarking in business, to effect the several policies in question, upon an assurance that he would address the ships to him, and permit him to receive the freight, and reimburse himself thereout for the amount of the premiums: upon a communication of this proposal to the underwriters, they gave *Gordon* credit for the premiums. The plaintiff also remitted to *Gordon*, whom he had drawn into other transactions with him, bills on *Thornton* and *Bayley*, which the latter refused to accept, alleging that they waited for some explanation from the plaintiff, but that all would be right, and in the mean time offered to accommodate the plaintiff by accepting his own bills for the like amount upon the security of these policies, which *Gordon* accordingly deposited in their hands. The plaintiff, instead of consigning his ships to *Gordon*, as he had promised, consigned them to *Thornton* and *Bayley*, and assigned the freight to them, so that *Gordon* was left destitute as well of the means of receiving the loss on the *Vigilant*, and returns of premium, as of the expected funds to arise from the freight for the payment of the premiums to the underwriters. The defendant, therefore, claimed now to set off the premiums, which he had never received, against the loss and returns to which he was liable. The jury, thinking that when the underwriter signs a policy, and thereby acknowledges the receipt of the premium, the account is finally closed between the assured and underwriter, found a verdict for the plaintiff.

*Lens*, Serjt. having in this term obtained a rule *nisi* to set aside the verdict, and have a new trial,

*Best*, Serjt. shewed cause. He contended that it was not competent for the underwriter to dispute the fact of the payment of the premium, which he had solemnly acknowledged on the policy, against the assured. In the case of *Dalzel v. Mair*,  
1 *Campb.*

1 *Campb. N. P.* 532., which bore at least as much the aspect of fraud as this does, the policy was held to be conclusive evidence of payment. The distinction is taken in the case of *Diry v. Bland*, 1 *Park*, 6 *Ed.* 34., that as between the broker and underwriter the policy is not conclusive evidence of the payment of the premiums, but as between the underwriter and assured, it is conclusive. If there had been any suggestion of fraud, that was a fact to be tried by the jury, who have found that there was no fraud. [*Lawrence*, J. observed, that the like verdict had been found in the case of *Mavor v. Simeon* in this Court, *post.* 497. n., yet the Court did not think that the finding concluded the fact, there being no evidence of fraud.]

1811.

---

 Foy  
v.  
Bell.

[ 495 ]

*Lens* and *Vaughan*, Serjts., *contra*, contended, that there was in this case abundant evidence of fraud. The credit which *Gordon* obtained was created and kept up by the representations which the plaintiff enabled *Gordon* to make to the defendant. It did not therefore lie in his mouth, to claim a repayment of premiums as having been paid, which in truth never were paid, and which failed to be paid through the plaintiff's own gross treachery, without at least allowing those premiums in account. [*Mansfield*, C. J. suggested, whether if the plaintiff procured the policies to be effected, knowing that the premiums were not paid, and that he never intended to supply the funds to pay them, that fraud would not make the policy void, and in such case the consequence would be that the plaintiff would not be entitled to recover the loss upon the *Vigilant*.] *Lens* denied that the policies would be void.

The Court were all of opinion that there ought to be a new trial. The jury were strongly impressed in this case, as they were in the case of *Mavor v. Simeon*, with the general doctrine that the transaction is closed when the underwriter writes his receipt, and that he cannot afterwards say the premium has not been paid. But the plaintiff knew, as appeared by his own letters, that *Gordon* was perfectly unable to pay these premiums. The plaintiff had prevailed on him to effectuate these policies, in effecting which he knew that *Gordon*, according to the common course of business, got receipts for this immense sum, and he knew that the defendant must give these receipts. The plaintiff knew that *Gordon* had no fund out of which that money could have been paid. He knew that, according to the course of business, though receipts were to be given by the underwriters who subscribed the policies, yet in fact no money had ever passed

[ 496 ]

1811.

FOY  
v.  
BELL.

passed between the underwriter and broker: he knew he had promised the broker to put into his hands the proceeds of the cargo of the *Vigilant*, and that he should also receive the freights of the other three ships: and then with regard to the freights, he has given the freights of these three ships to *Thornton* and *Bayley*; they became the assignees of the ships, and received the freights, and therefore the plaintiff knew that the broker never paid the premium. Knowing then that *Gordon* received the receipts, and that he never would pay the premium, he brings actions in this Court to recover back premiums which he knew never were paid, nor could be paid. So that this is a monstrous proposition on the part of the plaintiff, who says by this action against the underwriters, return me that premium which you never received, but which you ought to have received, and which you would have received, if I had not cheated the broker, by promising him this fund out of which he was to pay the premium, and then diverting it into another channel. It is impossible that can be supported, and therefore there must be a new trial.

Rule absolute.



---

MAJOR

## MAYOR v. SIMON.

1810.

May 14.

THE plaintiff declared, that in consideration that the plaintiff had before that time, as an insurer, underwritten certain policies of assurance as to certain sums therein subscribed against his name on the ships and merchandises in those policies specified, without receiving the premiums therein mentioned, the defendant undertook to pay him so much as the premiums amounted to; upon request: there were also a count for interest, and the usual money counts. Upon the trial of the cause, at the *London* sittings after *Michaelmas* term 1809, before *Mansfield*, C. J., it appeared that the defendant having long employed *Haynes*, a broker, to effect insurances for him; and the broker being considerably indebted to him on the balance of accounts, and the defendant much suspecting his circumstances, it was agreed between them, in order to keep the broker from bankruptcy, and to liquidate his debt due to the defendant, that *Haynes* should continue to effect insurances for the defendant as usual, and should *debit* him with the premiums, but should lodge all the policies in the defendant's hands, and permit him to receive the losses and returns of premium. The broker accordingly effected policies with the various persons, the premiums on which amounted to 12,000*l.*, and amongst others with the plaintiff, none of whom ever received the premiums, but credited the broker with the amount: the broker lodged the policies in the hands of the defendant, who never paid the broker the premiums. This course of dealing continued until the premiums for which *Haynes* credited the defendant, exceeded the balance due to him by 200*l.*, the defendant then ceased to employ *Haynes* to effect any more policies. It was contended for the defendant, that the plaintiff having acknowledged on the face of the policies the payment of the premiums, was estopped from claiming them as against the underwriter; if he chose to give credit to the broker, that was at his own risk; but to the broker alone could he resort for payment, if he did not insist on receiving it at the time of executing the policy. If this were not so, there would be an end of the whole system of underwriting. The special jury, unwilling to subvert so important a branch of trade, found a verdict for the defendant.

*Cockell*, Serjt. had obtained a rule *nisi* for setting aside the verdict, and having a new trial, against which

*Shepherd* and *Best*, Serjts., in *Ellary* term 1810, shewed cause. As to the special contract stated in the first count, there was no evidence whatever of any such contract being made in fact, and it was not a contract which could arise by implication of law, for the contract which the law would imply, must be according to the usage of the trade; and the usage of the trade was directly in opposition to any such practice. *Haynes* was employed to effect insurances after the arrangement between him and the defendant, precisely in the same way as before, there was no alteration made in the manner of doing business: no communication upon the subject was made by *Haynes* to the underwriters: if therefore the balance of premiums, upon the statement of accounts between *Haynes* and the defendant, had been in favour of *Haynes*, his assignees, (he having become a bankrupt,) would have had a right to recover that balance of premiums against the defendant. The defendant did not create

An underwriter after executing a policy and giving credit to the broker for the premium, may recover the premium against the underwriter, if it appear that the assured, to cover a balance due from the broker to himself, procured him to effect the insurance, debiting the assured in account with the premiums, and lodging the policies in the hands of the assured to enable him to receive the losses.

1810.

MAVOR  
v.  
SIMEON.

create these voyages and cargoes for the purpose of getting money from the underwriters; he was proceeding in the ordinary course of his merchandise, and caused *Haynes* to proceed in the same way, making only this alteration, that he required permission to receive the losses himself, which he had a right to do. *Dulzell v. Mair*, 1 *Campb.* 532., was precisely similar. This is not the case (to which *Cockell* compared it,) of a man, who suspecting his creditor, makes a large purchase of him, as in *Martin v. Pecktriss*, 4 *Barr.* 9476., with intention to set off the prices. All the cases prove this principle, that the contract of assurance is a contract between the assured and the broker, not between the assured and the underwriter, and the bargain is such, that, in the language of *Buller J.*, *Grove v. Dubois*, 1 *T. R.* 195., "It makes no difference whether at the time of making the policy, the underwriter knew the principal or not: he trusted to the broker, and credit was given to him, not to the other." [*Lawrence, J.* That case turned on the effect of a *del credere* commission. You say that there is a distinct contract between the broker and the underwriter; but if the assured be not a party, how could he sue on the loss. The argument requires that at least this should be a tripartite contract, for the underwriter engages to pay a loss and to return premiums.]

*Adjournatur.*

*Cockell* and *Marshall*, Serjts., on a subsequent day were heard in support of the rule, and the Court took time for consideration; but the rule was discharged two days after upon a compromise. And on this day the cause being named, the Counsel informed the Court that it was compromised, so that no judgment was given; but the inclination of the Court was visibly in favour of the plaintiff.

1811.

## MELLISH v. STANIFORTH.

May 22.

THIS was an action upon a policy of insurance at and from *Gottenburgh* to the ship's port of discharge in the *Baltic*, warranted free from capture and seizure in the ship's port or ports of discharge, upon the ship *Suwarrow*, and the insurance was declared to be on goods; the premium was ten guineas *per cent.*, to return five pounds for arrival. The loss was averred to be by hostile capture on the high seas. Upon the trial of this cause at *Guildhall*, at the sittings after *Hilary* term 1811, before *Mansfield*, C. J., it was proved that at the time of effecting this insurance, the circumstance of the warranty contained in this policy made the difference of one half in the premiums upon this risk. The vessel, having on the 20th of *August* taken a pilot on board at *Poehl*, who informed the master that the *French* were in possession of *Wismar*, came to an anchor in the open sea, at the south point of the isle of *Poehl*, about one *German* mile and three quarters, or seven *English* miles distant from *Wismar*, at which place she was destined to deliver her cargo, not within the reach of any guns from the shore; and on the same day, about five hours after, eight *French* soldiers came off in a boat from *Wismar* and took possession of the vessel, and on the following day a *French* officer coming off ordered the ship under weigh, and brought her to an anchor three or four miles further in, but in the roads of *Wismar*, not in the harbour, as she drew too much water to enter the harbour of *Wismar*, in which were only eight or nine feet water. The captors discharged her cargo in the roads, and carried it on shore in lighters. The master of the vessel and other witnesses proved that he could have gone further in, within two *English* miles of the harbour; that the place where he cast anchor was not within the port of *Wismar*; that vessels do not discharge their cargoes there, but usually approach four *English* miles and a quarter nearer to *Wismar* before they begin to discharge their cargoes; that there were two fathoms water in *Wismar* roads, and that this vessel which drew not more than eleven feet water, could have safely gone in within three *English* miles of the shore. The reason why the pilot did not carry him into *Wismar* roads immediately on his coming on board, was, that although the wind

A warranty against capture in the ship's port of discharge, does not include capture in the open sea on the outside of the port by a force issuing from the port of discharge.

[ 500 ]



1811.

MELLISH

v.

STANFORTH.

wind was fair for him to carry the ship in, it was not fair for him in case of danger to get out again. The Chief Justice being at that time of opinion (a) that it was a question of law whether the vessel were in port within the meaning of the warranty, the jury found a verdict for the plaintiff, subject to this point reserved.

Accordingly *Lens*, Serjt. having obtained in this term a rule nisi for a new trial,

*Shepherd* and *Best*, Serjts. showed cause, contending, that upon the words of this warranty, which like other conditions must be strictly and literally construed, it was wholly immaterial whether the capturing force issued from the port of discharge or not, provided that the vessel was not within the local ambit of the port of discharge at the time of her capture; on the other hand, a vessel captured within her port of discharge would be equally within this warranty, whether the capturing force had come from the coast of the opposite country, or had issued from the port. The only question was, as to the local position of the ship at the time of this capture; and it was quite clear from the evidence, that she was not then within her port of discharge; the reasons why she had not been brought within that port were also immaterial, but if it was fit to inquire into them, the reason in this case was a very good one, it was the duty of the master to his employers not to run his ship into the jaws of danger, from which he could not again extricate himself. This was a much stronger case for the plaintiff than the *Pillau* cases, in which the vessels had arrived at a situation where they usually lighten in preparation for passing the bar, and the captain had actually gone on shore to the custom-house with his papers. The circumstance of having a pilot on board does not mark the vessel as being in port. No vessel can legally come up the *Thames* or go round the back of the *Isle of Wight* without a pilot: yet it cannot be said that all vessels in those situations are in port.

*Lens* and *Vaughan*, Serjts. *contra*. The port of destination furnishing the hostility intended to be guarded against by this warranty, this loss is, within the meaning of the warranty, to be borne by the assured. In the *Pillau* cases the force did not issue from the port of discharge; the *Tilsit* privateer, which made the captures, came from *Dantzic*; had it come out from *Pillau*,

(a) But see *Reyner v. Pearson*, *contra*, 21 Nov., *Michaelmas* term. 1812, *post*.

the losses would have been within the warranty. The jury have not determined the point as a fact, whether this vessel were in port or not, they have expressly referred that point to the consideration of the Court. If the vessel had been lost off the south end of the Isle of *Poehl*, by capture by an extrinsic force, certainly that would be one of the perils against which the underwriters insure.

MANSFIELD, C. J. In this case the jury certainly were struck with that which is obvious to every one, that if a captain, acting either with or without the orders of his owner, means to be taken, he was as certain of being captured in the situation where this vessel anchored, as in port; so that if he were disposed to practise fraud, it might be very easily practised; here the ship waits five hours off the south end of the Isle of *Poehl*; the master being asked why he did not weigh anchor and depart when he saw the soldiers approaching, said that the wind was fair to go in, but not to come out. But the difficulty is, how to say, in the words of the warranty, that the ship was within the port; if she were within her unloading ground, that would be a strong ground to say, she was within the port, though not literally; but here she is four miles from the road, and if four miles will not protect her, I do not see how five would; nor do I see how we can say that the plaintiff has not a right to recover. Whether the underwriters can form a warranty to meet the mischief in some other way, may be considered; the warranty might be against any force in or issuing from the port of discharge.

Rule discharged.

1811.

MELLISH  
v.  
STANFORTH.

[ 502 ]

WATERS v. REES, one of the Bail of Sir W. MANSELL,  
Bart.

[ 503 ]

May 22.

SHEPHERD, Serjt. moved for a rule that the prothonotary, in taxing costs on the judgment obtained in this cause by the plaintiff, might be directed to compute interest at *5l. per cent.* on the sum of 1181*l.* 10*s.*, the amount of a judgment signed the 6th day of *July* 1810, in an action in which the same *Waters* was plaintiff, and Sir *W. Mansell*, Bart. was defendant, and in which action *Rees* and *T. Waters* did in *Easter* term, 50 *Geo.* 3., enter into a recognizance of bail upon this condition, that if judgment should be given for the plaintiff against Sir *W. Mansell* in that action, then the said Sir *W. Mansell* should satisfy all such

If a plaintiff recover a judgment for money lent, and interest, he cannot therefore require the bail to pay him interest on the amount of the judgment as part of his costs.

1811. such damages which should be adjudged to the plaintiff against him, or should render his body on that occasion to the prison of the *Fleet*: he prayed for this interest to be computed from 6th July 1810 to 14th May 1811, when the sum of 1181*l.* was paid to the plaintiff in part satisfaction of his judgment against Sir *W. Mansell*, and that the plaintiff might be at liberty to sue out execution against *Rees* for what was then remaining due on the said judgment against Sir *W. Mansell*, and for such interest, and costs so to be computed and taxed, and for sheriff's poundage, costs of levy, and all other incidental expenses. The circumstances stated were, the action was *assumpsit* for money lent and interest thereon, the plaintiff issued a writ of *capias ad satisfaciendum* against the principal, but being unable to take him, he proceeded in *Michaelmas* term against the bail.

[ 504 ]

*Lens*, Serjt. shewed cause against this rule in the first instance. This is a novel attempt, and does not come within the terms of the recognizance. For it is plain that the plaintiff never did or could recover this interest against the principal in this action, whatever he might do in a new action upon the judgment, but it is only in this action that these bail are liable. It would be peculiarly hard to subject the bail to this burthen in the present case, because their principal, by leaving the realm, has put it out of their power to surrender him.

MANSFIELD, C. J. (after inquiry made of the officers). We have never known any instances of this having been granted, which is a sufficient answer to the present application: we ought not to load the bail with more liabilities than they at present incur.

Rule refused.

May 24.

GOULD and Others, Administrators of ROBINSON v.  
BARNES.

If a person enter into a bond by a wrong Christian name, and be sued on such bond, he should be sued by such name. A declaration against him by his right name, stating that he, by the wrong name, executed the bond, is bad.

THE defendant, *Joseph Barnes*, entered into a bond to *Robinson* by the name of *Thomas Barnes*; throughout the bond he was called *Thomas*. In debt on this bond, the defendant was sued by his real name *Joseph*, and the declaration stated that he, "by the name and description of *Thomas Barnes*, of &c., by his certain writing obligatory, sealed with his seal, acknowledged himself to be held and firmly bound," &c. The defendant pleaded *non est factum*. At the trial of the cause before *Lawrence, J.* in *Guildhall*, at the adjourned sittings after *Hilary* term, *Best*, Serjt., for the defendant, contended, that upon

upon this declaration the plaintiff ought to be nonsuited; *Lawrence*, J. however permitted the \* plaintiff to take a verdict, and said, that as the objection was on the record, the defendant might move in arrest of judgment if he should think fit. A rule *nisi* for that purpose was applied for and obtained on a former day; and in support of the application *Hyckman v. Shotbolt*, *Dyer* 279. *b.*, and *Field v. Winlow*, *Cro. Eliz.* 897., were cited.

On this day *Vaughan*, Serjt. shewed cause against the rule.

LAWRENCE, J. Is not the case of *Clarke v. Istead*, in error; *Lutw.* 894. directly to the point? Is there any thing in this?

*Vaughan*, Serjt. admitted, that if the defendant had been sued by the name of *Thomas*, and had pleaded in abatement that his name was *Joseph*, he would have been estopped by the bond; but contended that the sheriff could (*a*) not have executed final process against him by the name of *Thomas* without being a trespasser.

CHAMBRE, J. If the defendant had pleaded in abatement, it might have been replied, that he was known as well by the one name as the other, and the bond would have been evidence of it.

Rule absolute (*b*).

(*a*) See *vide* 1 *Roll.* 869. *l.* 50., and *Rock v. Leighton*, 1 *Salk.* 310.

(*b*) *Acc. Gilb. H. P. C.* 216, 217.

1811:

GOULD

v.

BARNES.

[ \* 506 ]

### DOE, on the Demise of LEDGER, v. ROE.

[ 506 ]

May 24.

*VAUGHAN*, Serjt. moved that the judgment and execution in this case might be set aside on payment of costs, and that one *Palethorpe* might be let in to defend: and grounded his motion on an affidavit made by *Palethorpe*, wherein he swore that the premises descended from his grandfather to his father, and from his father to him, subject to the payment of 5s. to the churchwardens, by whom this action was brought; that the churchwardens had brought several other ejectments, and had never proceeded beyond declaration, and that therefore, when this was served, he thought it would be as usual, and did not instruct his attorney. The Court however said that if *Palethorpe* had a good title he might bring his ejectment.

The Court will not set aside a judgment and execution in ejectment in order to let in a person to defend, though he make an affidavit setting forth a clear title, and offer to pay costs.

Rule refused.

1811.

May 24.

## FEISE and Another v. AGUILAR. (a)

If a British subject has an interest in any part of a cargo, on a valued policy, he may recover to the extent of the policy on a

[ 507 ]  
count averring interest in himself, if he proves some interest, although alien enemies may be interested in other parts of the cargo.

THIS was an action upon a policy of insurance upon goods, valued at 19,000*l*. Several persons had contributed to form this cargo, respectively becoming partners with the plaintiffs in various assortments of goods which those persons chose. The plaintiffs were interested in the proportion of four parts in nine of the whole, and the other persons, some of whom were alien enemies, were interested in the other five parts, the plaintiffs had written instructions to their broker to insure four parts in nine for the account of the plaintiffs and others; but there was no evidence that any others than the plaintiffs had acquired any interest in those four parts. The plaintiffs obtained a verdict upon a count in which they had laid the interest in themselves.

*Lens*, Serjt. had obtained a rule *nisi* to set aside this verdict, upon the ground that in this count the interest was not duly alleged, for that the 19,000*l*. was intended to cover the whole cargo, and therefore the interest ought to have been laid in all the persons interested. Upon the other counts the question of alien enemy arose, whose interest was not protected by a licence to *Feise* and Co., on behalf of themselves and others.

*Shepherd* and *Best*, Serjts. shewed cause, and *Lens* and *Vaughan*, Serjts. endeavoured to support the rule.

MANSFIELD, C. J. Suppose other persons besides the plaintiffs were interested, yet if the plaintiffs were interested (b), is not that sufficient in the case of a valued policy? It has been held again and again, that it is unnecessary to prove the amount of interest under a valued policy. Therefore we must take it that the value insured is the value of the plaintiff's interest.

[ 508 ]  
HEATH, J. This objection certainly was not started at the trial; no doubt it appeared that others were interested in the other five parts, but *Feise* and *Fannius* had a several interest in the four parts; the purport of the instructions to the broker were, to insure, as to those four parts, for their account, and the account of others who may interest themselves, *i. e.* in those four parts. It was competent for the plaintiffs to insure their

(a) See *Fayle v. Bourdillon*, the last case in this term, *post.*, and *Fair v. Bell*, *post.*, vol. 4. p. 4.

(b) See the case of *Cohen v. Hannam*, 5 July, Trinity term, 1813, *post.*, vol. 5.

separate interest, as it was competent for others to choose whether they would insure their's or not. The defendant ought to have shewn that others did acquire an interest in those four parts, before he could raise this objection.

*Lens* admitted that both answers were decisive, and without going into the construction of the licence, the

Rule was discharged.

1811.

FEISE  
v.  
AGUILAR.

### GOLDSCHMIDT v. WHITMORE.

May 24.

**T**HIS was an action upon a policy of insurance at and from *Hamburg* to any port in the United Kingdom, on goods as interest might appear in case of capture, seizure, or detention by any power whatsoever, the underwriters were to pay the loss within 2 months. Upon the trial of the cause, at the sittings after *Hilary* term 1811, before *Mansfield*, C. J., it appeared that the vessel *Anna Catherina*, on board of which were the goods insured, and which were jointly the property of the plaintiff and of certain *Hamburgers*, sailed from *Hamburg*, destined by the assured for a port in *England*, but that the master bartrously shaped his course for a blockaded port in *Holland*, and being taken by an *English* cruizer, was libelled in the *English* court of admiralty, and condemned "as belonging to the enemies of our lord the king, or otherwise liable to confiscation." The plaintiff had averred the loss to be, that "the master of "the ship, in a barratrous and fraudulent manner, took and "carried the said ship or vessel, with the said goods on board, "to places to the plaintiff unknown, by means whereof the goods "became and were subject to capture, seizure, and confiscation, "and were accordingly captured, seized, and confiscated, and "wholly lost to the plaintiff and the other persons interested." After verdict for the plaintiff,

*Lens*, Serjt. in this term obtained a rule *nisi* to set aside the verdict and enter a nonsuit upon two grounds: first, that the licence which had been produced at the trial, (the terms of which it becomes unnecessary to state, an account of the ultimate decision of the Court on that point,) having expired, was insufficient to legalize the adventure; secondly, that it having been decreed by a Court of competent jurisdiction, that the goods in question were enemy's property, the sentence was con-

A sentence condemning as enemy's property a cargo, which the master had bartrously carried into an enemy's blockaded port, although it may be conclusive evidence that the cargo was enemy's property at the

[ 509 ]  
time of capture and condemnation, does not disprove the allegation that the cargo was lost by the captain's barratrously carrying the cargo to places unknown, where by the goods became liable to and were confiscated.

1811.  
 ———  
 GOLD-  
 SCHMIDT  
 v.  
 WHITMORE.

clusive evidence on that point, and therefore the plaintiff could not recover upon an insurance of hostile property.

*Shepherd and Best*, Serjts. on this day shewed cause. They contended on the first point, that at the time of this adventure, which was in *July 1810*, *Hamburgh* not being then an hostile port, a consignment from that country to this was a legal adventure; for although *Hamburgh* was a port from which the *British* flag was then excluded, and therefore an adventure from that port to another port from which the *British* flag was excluded would have been liable to confiscation under the *British* orders in council, yet there was in the order in council of the 11th of *November 1807*, in the 6th article, (1 *Edw. part 1. Appendix*) an exception in favour of "any vessel, or the cargo of any vessel belonging to any country not at war with his majesty; which should be coming from any port or place in *Europe* which was declared by that order to be subject to the restrictions incident to a state of blockade, destined to some port or place in *Europe* belonging to his majesty, and which should be on her voyage direct thereto." Nothing therefore in the *English* municipal law took this adventure out of the general condition of neutral states, which, by the law of nations, may lawfully trade with a belligerent. With respect to the second point, he suggested that the plaintiffs, who claimed the cargo in the prize court, and who completely satisfied that court as well as the jury that they were innocent of the intention of going to *Holland*, prayed that court to alter the terms of the sentence, upon the ground now objected, that it would discharge the underwriters, by furnishing them with conclusive evidence that the cargo was enemy's property; but the learned Judge who presided in that court, answered their doubt by saying that it was only evidence that the cargo was enemy's property at the time of condemnation, but not that it was such when the risk attached. And the fact was truly so; for the circumstance that constituted the goods to be enemy's property was the master's barratrously taking the ship into an hostile port, which is one of the risks insured against, and her being enemy's property is only the consequence of the loss which happened by a risk insured. *Earl v. Rowcroft*, 8 *East*, 126. A loss by condemnation for trading with an enemy was held to be a loss by barratry: the terms of that sentence must have been similar to this.

[ 511 ]

*Lens and Vaughan*, Serjts. in support of the rule. Up to the present day it is the practice for those who are in the *Hamburgh* trade

ade to obtain licences, and the practice is much stronger evidence of the necessity of a licence than the superficial research which counsel can make into these numerous and complicated orders of council for the purpose of a single cause, is of its being unnecessary. From the circumstance that it was necessary for the vessel at that time to take out from *Hamburgh* a fictitious clearance for *Holland*, it may be considered that *Hamburgh* was then in a state of war with this country. As to the second point, the sentence being conclusive evidence of all the facts which it affects to decide, is, according to the authorities of *Bolton v. Bradstone*, ante, 2. 85., *Pillard v. Bell*, 8 T. R. 434., *Lothian Henderson*, 3 Bos. & Pull. 499., *Kindersley v. Chace*, 2 Park, ed. 485., conclusive evidence that the goods were enemy's property. It is not competent for this Court to inquire how they became such. It is merely a verbal criticism to say that the goods were enemy's property at one period, but not at another, and it cannot avail the plaintiffs. In *Earl v. Rowcroft* : may be presumed that the sentence of condemnation, which is not before the Court, was for contraband trading: in this case, or any thing that appears, as the proceedings in the court of Admiralty are not all before this Court, there may have been, and it must be presumed that there was, an allegation of her being hostile property to warrant the terms of this sentence. The sentence makes it hostile property not for one purpose only, but all the conclusions and consequences of its being hostile must follow. [They prayed that the case might be again argued by civilians, but the Court thought it was wholly unnecessary.]

MANSFIELD, C. J., after reading the allegation of the loss, asked whether the evidence which sustained it, did not also prove that the act of the master made the goods to be lost, call enemy's property, or call it what you will? How does the sentence subsequently pronounced affect the case? I do not at present think this falls within the cases of sentences being conclusive; but supposing it to be conclusive, I do not see how it helps the defendant. It is the master's barratrous act in carrying the vessel near the enemy's coast, that makes it enemy's property, *quoad* this captain, it is enemy's property, but it is his act that makes it such; it is equally lost to the owner by the captain's act, whether it be by his making it enemy's property, or by other misconduct. It would be strange to say that the underwriters should be discharged, when it is the barratrous act of the captain that causes the loss.

1811.

GOLD-  
SCHMIDT  
v.  
WHITMORE.

[ 512 ]

LAWRENCE,



1811. LAWRENCE, J. We do not gainsay the sentence at all; it may be enemy's property, but it was the captain's barratrous act that made it so.

GOLD-  
SCHMIDT  
v.  
WHITMORE. HEATH, J. That is the plain and intelligible ground to put it on.

Rule discharged.

[ 513 ]

(IN THE EXCHEQUER-CHAMBER.)

May 25.

COUSINS v. NANTES and Another. In Error.

A wagering policy and a policy on interest, are contracts distinct in their nature and incidents.

It must appear on the face of the policy of which species the contract is.

If the policy be in the common form, it is a policy on interest.

If it be a policy on interest, the declaration must aver in whom the interest is vested.

THE plaintiff below declared upon a policy whereby the plaintiff below and *R. M. French* did, as well in their own name, as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain, in part or in all, cause themselves and them and every of them to be insured, lost or not lost, at and from *Elsineur* to *Ferrol*, *Cadiz*, and *Carthagena*, upon the ship called the *Hoop*, valued at 1460*l*. The plaintiff averred, amongst other matters, that the ship *Hoop* was not at the time of effecting the policy, or at the time of the happening of the loss thereafter mentioned, or at any other time whatsoever, the property of, nor belonging to his majesty the king of *Great Britain*, or of any of his subjects. And that the plaintiff below, together with *R. M. French*, were the persons who gave the orders to the agent immediately employed to effect that policy, and alleged a loss by arrest by order of his majesty, and condemnation in the court of admiralty. The defendant below demurred, and assigned for causes, that it was not alleged, nor did it appear by the first count of the declaration, for whose use or benefit, or on whose account, the policy was made, and also for that it was not therein alleged to whom the ship in that count mentioned did appertain in part or in all, or what person or persons were interested or concerned in the insurance effected thereon by that policy: and also for that it was not alleged, nor did it appear, that the assureds, or either of them, or any other person or persons whatsoever, had any interest, property, or concern in the ship or insurance; and also that it was alleged that the ship became wholly lost to the assureds, and to every other person to whom the same did or might appertain in part or in all;

[ 514 ]

all; but it was not alleged, nor did it appear with sufficient certainty by the declaration, to whom, or to what other person or persons besides the assureds, the ship became wholly lost, and that it appeared by the declaration that the action in that respect was brought for the use of the plaintiff below as the survivor of *R. M. French*, and also of every other person to whom the ship did or might appertain in part or in all, but it was not alleged, nor did it appear by the declaration, and with sufficient certainty, to how many and what other persons the ship did appertain in part or in all. The Court of King's Bench in *Easter* term 1802 gave judgment upon this demurrer for the plaintiff below. See *Nantes v. Thompson*, 2 *East*, 385.

The defendant below brought error, and assigned the general error; and the case was thrice argued, twice before the reporter began to take notes in this Court, viz. the first time by *Giles* for the plaintiff in error, and *Puller* for the defendant in error, in *Hilary* term 1804; the second time by *Gibbs* for the plaintiff in error, and *Park* for the defendant in error, in the *Easter* term following. The judgment stood over, as it was understood, until the decision of the House of Lords in the case of *Lucena v. Crawford*, on the first writ of error; 2 *New Rep.* 269. A third argument was in *Trinity* term 1809 directed by the Court: and the case was in *Michaelmas* term 1809 argued by

*R. Carr* for the plaintiff in error; who stated that the defendant in error had on the former arguments made two points: first, that it was lawful at common law to effect an insurance without interest; secondly, that since the statute 19 *Geo.* 2. c. 37. it was not necessary to aver an interest. *Carr* combated the first proposition, and mainly relied upon the judgment given by Lord *Eldon*, Lord *Ellenborough*, C. J., and Lord *Erskine*, Chancellor, in the case of *Lucena v. Crawford*, 2 *New Rep.* 315. He also referred to *Depaiba v. Ludlow*, *Com. Rep.* 260. [The Court, after directing the counsel to withdraw, declared, that the only question in *Lucena v. Crawford* was, whether the count, which was penned in a peculiar way, contained such an averment of interest as would support the judgment of the Court below; therefore the judgment on the principal point in that case did not at all affect the present question, but that the Court considered it to have been by that case solemnly determined, without even a difference of opinion among the Judges, that at common law, wager policies, or insurances without

1811.

COUNINS  
v.  
NANTES.

[ 515 ]

1811.  
 ———  
 COUSINS  
 v.  
 NANTES.

[ 516 ]

without interest, were lawful; and that it was impossible to say that any wager which was not (as it was said) contrary to the policy of the law, that is, contrary to morality, or hurtful in a political point of view, was not a legal contract. Therefore the argument for the plaintiff in error might be confined to the second point, that the persons to whom the interest belonged, should appear on the policy.] Carr then contended that the declaration was bad, because the contract, which it was intended to describe, was a policy upon an interest, and that being so, it was necessary that the plaintiff should state upon the face of his declaration where that interest resided. If he had meant this insurance to be an insurance without interest, he should have so described it in his contract. But this policy neither contains words dispensing with the proof of interest, nor averring that the assured had no interest, nor averring that the ship is a foreign ship. It must therefore be taken to be an insurance on interest, which is the most ordinary class of insurances. All writers define an insurance as a contract of indemnity: every insurance must therefore be presumed to be such unless expressly distinguished. In the case of *Nantes v. Thompson*, it was proposed to avoid the difficulty by inserting in policies the words "on interest;" but that expedient was never yet practised. If, therefore, every policy made in the common form is and purports to be an insurance on interest, the assured under such a policy would, if he had no interest, be entitled to a return of premium, as well before as since the statute 19 G. 2. c. 37. There is no other ground upon which a return of premium in such a case can be accounted for; but it appears from the cases, that before that statute a plaintiff was entitled, on failure of interest, to a return of premium, which could not have been, if his policy described an insurance without interest. *Martin v. Sitwell*, 1 Sho. 156. [*Mansfield*, C. J. Upon an insurance made on "interest or no interest," the premium cannot be recovered back on account of the want of interest, because the question of interest has nothing to do with it. No doubt, if a policy purports to be made upon an interest, and it turns out that no interest exists, that policy is void, and the premium must be recovered back.] If this were otherwise, it would have been wholly unnecessary, before the statute, to have averred an interest, yet all the precedents, before the statute, either contain a dispensation of the proof of interest, or aver interest; and since the statute they have uniformly averred

averred it on policies on foreign ships, until the declaration in *Crawford v. Hunter*, which was the first instance to the contrary. *Goram v. Sweeting*, 2 Saund. 200., which was relied on as an instance to the contrary, has a stipulation that the ship should be "valued at 300*l.* without any farther account to be rendered for the same," which means without further account of interest. *Vidian*, 26. & 48. *Precedents in Upper Bench*, 1653. A manuscript precedent of Serjeant Poole's. *Goslin v. Thorpe* in 1741. *Blake v. Dumcalfe* in 1731, *ibid.* and several other manuscript precedents, are cited in *Crawford v. Hunter*, 8*T. R.* 18. The adjudged cases are, *Goddard v. Garrett*, 2 Vern. 269. which was a bill to have a policy delivered up, upon the ground that the assured had no interest in the ship or cargo. The Court said, the law is settled, that if a man has no interest, and insures, the insurance is void, although it be expressed in the policy, "interested, or not interested." This shews the necessity of the averment, for though a policy without interest was a contract to which the law would give effect, it was one which the courts of equity would not permit to be enforced. [*Mansfield*, C. J. The courts of equity formerly exercised an odd jurisdiction upon the subject; but they could not have proceeded upon the ground that an agreement was good on one side of *Westminster-hall*, and not on the other.] Lord *Eldon*, in his judgment, refers to *Depaiba v. Ludlow*, and other cases, where it is said, that the effect of the act was merely to change the form of the policy. Lord *Eldon* considers that those words affected merely the proof, and not the legality of the contract. [*Mansfield*, C. J. It is a part of the contract if the insurance be, "interest or no interest:" it has nothing to do with the proof: Lord *Eldon* states, that if the insurer having admitted an interest which he supposed capable of proof, afterwards discovered that no interest existed, he might state to a court of equity that he had been taken by surprise in his admission, and the policy would be ordered to be delivered up. He is contemplating policies which are good at law; but how that could be done except upon cases of fraud, or other external circumstances, I am at a loss to conceive, except in a few cases where the defendant's proof might have been lost.] If it be not a policy upon interest, there can be no partial loss, no abandonment, no return of premium. If it be a policy upon interest, it is necessary to aver and to prove in whom that interest is vested, and a variance therein is fatal.

The

1811.

COUSINS  
v.  
NANTER.

[ 517 ]

[ 518 ]

1811.

COUSINS  
v.  
NANTES.

The statute says nothing respecting the averment of interest, it only says that policies containing certain words, interest or no interest, shall be void. The argument would go to this length, that it was absolutely unnecessary to aver interest in declaring on any policy before the statute, and on any policy on a foreign ship since. If a man having no interest makes a policy in the common form, without apprizing the assured that he has no interest, he commits a fraud, by persuading the other to enter into a contract possessing incidents which do not belong to his real situation.

*Puller*, for the defendant in error. The question, as now narrowed, is merely this, whether since the statute 19 G. 2. c. 37. a policy can be effected on a foreign ship without notifying to the underwriters that the ship is foreign? For since wagering policies were legal before that statute, and since that statute leaves the case of foreign vessels untouched, it is impossible that it should render a new averment necessary with respect to them, which was not necessary before. [*Mansfield*, C. J. That is not contended for, but that it was always necessary to state something on the face of the contract to shew that it was a wagering policy.] In *Lucena v. Crawford* most of the Judges said, (p. 308.) that before the statute it had been most usual to aver interest, but that precedents without it were to be found, and that such an averment was not essential to maintain a declaration upon the policy; it was sufficient to shew in the case of a policy upon interest, that a real loss had been *bonâ fide* sustained. [*Mansfield*, C. J. They were there speaking of a common policy.] If on a common policy it was not necessary before the statute, there is no reason why it should be necessary in this case, which by the particular form of the averment is made still stronger than the ordinary case. Lord *Eldon* says, that in the case of a foreign ship the averment of interest is dispensed with on account of the difficulty of proof. But this judgment in *Lucena v. Crawford* would deliver the defendant in error from the necessity of such an averment, even if this were not a foreign ship. *Martin v. Sitwell* appears to have been an insurance on goods, and there were no goods put on board, so that the policy never attached. In *Goram v. Sweeting* there is no averment of interest, nor does "account" mean proof of interest, but proof of value, and as *Grose*, J. observed in *Nantes v. Thompson*, 2 East 392., "that could not, according to any rule of pleading, dispense with the necessity of averring an interest, if without such

[ 519 ]

such averment there could be no breach of the defendant's undertaking." The only allegation in *Goram v. Sweeting*, from which interest could be inferred, is, that the ship was lost, and that the plaintiff abandoned *totum interesse suum*. But if this were introduced as an averment of interest, it would be clearly demurrable. It is held in *Lucena v. Crawford*, that an allegation of interest is unnecessary. In *Clift Ent.* 77. is a declaration without any allegation of interest: it is quite clear the statute did not make any new averment necessary, for it only prohibited that which had been usual before, and excepted out of the prohibition the case of foreign ships. The Court of King's Bench said, "every man can ask whether the ship he insures is foreign or English." Is it to be presumed, when I state on my count that the ship is not *English*, that it was not disclosed to the underwriters that she was foreign? [*Mansfield*, C. J. The objection is not, that the interest is not alleged in the declaration, for enough is said there to shew that the plaintiff meant to avail himself of her being a foreign ship; but it is contended that it must be shewn on the policy, whether she was a foreign or *English* ship.] None of the policies stated in any of the precedents of declarations, notice the ship as being foreign, nor do they notice any part of such a contract as might dispense with it. If then, before the statute, interest or want of interest was not distinguishable on the policy, then this, which is the excepted case of a foreign ship, must now stand on the same ground as all cases did before the statute. [*Heath*, J. Why may not you insure a foreign ship, interest or no interest, and refer it to the event to see in what manner you shall declare, and what shall be the relative rights arising out of the policy?] The contract would be binding on the parties to adopt the situation in which they stood at the time of making the contract, with all its incidents. [*Mansfield*, C. J. Nothing is said in the statute about the form of the policy, nor about the averment of interest. The only use of an averment of interest is, to inform the defendant with sufficient certainty, in whom the plaintiff means to insist that the interest is. It is equally a valid and legal contract, in whomsoever the interest may appear: it is a mere question of form: nothing arises here on defect of evidence. *Wood*, B. It is all reducible to this; if the nature of the contract includes a warranty that the assured has an interest, then interest must be averred in the declaration.] The majority of the Judges decided that the statute of *Geo. 2.* only prohibits

1811.

---

COUSINS  
v.  
NANTES.

[ 520 ]

1811.  
 COUSINS  
 v.  
 NANTER.

[ 521 ]

hibits forming a contract to dispense with proof of interest at the trial. If it was necessary for the plaintiff below to prove interest at the trial, and if he failed to do it, the objection was to the verdict, then; but it does not necessarily follow that because the plaintiff below did not then prove interest, it is therefore a good objection now, that he did not aver it. This averment authorized him to prove at the trial that the ship neither belonged to his majesty nor to any of his subjects, therefore it must necessarily have been foreign. [*Mansfield*, C. J. Looking at this policy, I think there is great weight in what the counsel for the defendant in error has urged, that in *Lucena v. Crawford* the Judges held that an averment of interest was unnecessary. For what are the words of the policy? He causes *himself* to be insured; it imports the thing insured to be his, otherwise how can *he* be insured, except in wager policies? This then is only necessary to be proved at the trial: if it be not proved at the trial that there is a real interest, there must be a nonsuit; but that does not touch the question whether an averment of interest is necessary.]

*Carr* in reply. The argument of the plaintiff in error has been misunderstood. It is this, that if the plaintiff below meant to insist upon an insurance without interest, he must shew it on the policy. [*Mansfield*, C. J. You urge, and with truth, that a policy in the common form is a contract of indemnity, as in form it is: if so, and inasmuch as every contract of indemnity is a contract founded on interest, in stating that contract the interest appears; and why is it necessary to allege it again? If the plaintiff does not prove his interest at trial, he is gone, but it is unnecessary to aver the interest twice. The question certainly goes to this, whether it is in any case necessary to aver interest even in a *British* ship.]. The whole practice, since the statute, is contrary to that proposition, though two or three precedents may be found before it, without an allegation of interest, or dispensation of it; but *Goram v. Sweeting* is not one of them. It is equally necessary for the defendant to be told in whom the interest will be contended to be, as for him to know whether any interest exists. It is not necessary that all policies upon foreign ships should be with interest or no interest, but if it is meant for a gaming policy, let the parties declare it; if for a contract of indemnity, let that purpose be expressed. [*Mansfield*, C. J. The argument has mixed a great deal with the necessity of the averment of interest before the statute; but the single question here

[ 522 ]

here is, whether it was necessary to shew on the policy that this was a gaming policy.]

1811.

*Cur. adv. vult.*COUSINS  
v.

NANTER.

MANSFIELD, C. J. on this day delivered the judgment of the Court.

It was impossible for the Court below to decide this case otherwise than they did while their decision in *Crawford v. Hunter* stood. The single question is, whether on a policy, such as this is, the averment contained in this declaration is sufficient to maintain the action? The policy is in the common form, without any thing in it leading any one to suppose that it was otherwise than an ordinary policy. It is alleged that the ship became wholly lost to every person interested, but there is no allegation of interest in any person in the declaration. The authority of *Crawford v. Hunter* has been much shaken since; in the case of *Crawford v. Lucena*, the verdict was taken in such a way as not to include the count in which no interest was alleged; counsel of great eminence avoided it, which shews they thought it doubtful. The case of *Goram v. Sweeting* in *Saunders* was much talked of, and there is in the declaration in that case no averment of interest: *Saunders* was counsel for the defendant, and was astute enough to have taken the objection if it had been tenable. Some entries are to be found, without any allegation of interest; but those found with it are stronger authorities; for no one would incur himself with such allegation if he could avoid it. Wager policies at last came to be legal, nobody knows how, contrary to common sense; at most it only proves the opinion of the persons then in the habit of drawing declarations, who were not, as now, counsel in the causes, but officers of the court, viz. the prothonotaries of the Court of Common Pleas; one cannot see why such an allegation should find its way into a declaration, unless necessary. With respect to the true nature of the contract of indemnity, it has been argued, that if there be no interest, no loss can happen; every word in the policy shews that it was an instrument to protect merchants; the words at the beginning of the declaration are, "according to the usage and custom of merchants;" it is not the usage and custom of merchants to gamble. If this be so, every policy must be taken to be on interest, unless something be stated, shewing the contrary. In this policy, there is nothing shewing that it was not on interest. If it be admitted, as it is, that interest must be proved at the trial, it must be alleged also, that the defendant

[ 523



1811.

COUSINS

v.

NANTES.

[ 524 ]

defendant may be prepared at the trial to meet it. This policy must be taken to be on interest; to support an action on a wagering policy, something must appear to shew that it is such. The preamble of the statute 19 G. 2. c. 37. recites, that the making assurances, interest or no interest, or without further proof of interest than the policy, had been found pernicious, from whence it seems as if, before that act, all policies were on interest or no interest, or without further proof of interest than the policy: it is true that the act goes on, when enacting, to use the same words, and adds, "or by way of gaming or wagering, or without benefit of salvage to the assurer." The language of this act seems strongly to prove, that before it passed it was usual to put in policies the words "interest or no interest," or some other words, in order to shew that it was a wagering policy; and to be sure, unless there were words to distinguish wagering from other policies, there would be a great disadvantage to the underwriters. On a wagering policy, there is no salvage, no abandonment, no return of premium for short interest; it is the interest of the insured that the ship should be lost; but it is the contrary on a policy on interest; there is salvage, there is an abandonment, there is a return of premium for short interest; there it is usually the interest of the merchant to labour for the safety of the vessel. Consequently it is absolutely necessary, in order to give the underwriter a fair advantage, that he should know it is a wagering policy. In this declaration it is alleged, that the ship did not belong to the king, or any of his subjects: this was intended to supply the necessity of words, tending to shew it was a wagering policy. But it is not enough to shew these circumstances in the declaration; if they are not shewn in the contract, it is necessary that it should be inserted in the contract whether the policy is a wagering policy or not. This, then, is not a wagering policy, but an ordinary policy, made for the purpose of indemnifying the person insured, and there is no declaration upon such a policy in any case since the statute 19 G. 2. c. 37. of which I am aware, except that of *Crawford v. Hunter*, wherein the allegation of interest has been omitted. Upon such a policy, therefore, we are of opinion, according to the practice of 60 years, since the statute, that it is necessary to allege the interest in the declaration, in order that the defendant may see what that interest is, and in whom it is; for it is very necessary that the plaintiff should know what interest is intended to be relied on,

on, because he may, by disproving it, in many cases defeat the action. We therefore think, that on this declaration, the plaintiff in the Court below ought not to have recovered.

Judgment reversed.

1811.

COUSINS  
v.  
NANTHA.

---

SHERBORNE v. SIFFKIN.

[ 525 ]  
May 26.

THE defendant, who was a foreign mariner, having sued the plaintiff for freight, and the plaintiff having commenced the present action against the defendant for damage occasioned to the cargo to a much greater extent than the amount of the freight;

*Best*, Serjt. moved that the plaintiff might pay the freight into Court, there to be impounded, and to go towards the damages which the plaintiff might recover in the present action. It was not legally a matter of set-off, and it was feared the defendant would obtain judgment for the freight before the plaintiff could obtain judgment for the damages, and would levy it, and leave this country.

*The Court* held, that if the defendant had a right to recover, he had a right to receive his money, and refused to interfere.

Rule refused.

---

HOWARD v. RAMSBOTTOM, Assignee of GEORGE.

[ 526 ]  
May 27.

THIS was an action of trover. Upon the trial of the cause at the sittings after *Michaelmas* term 1810, before *Mansfield*, C. J., the defence was, that the defendant was the assignee of the effects of the plaintiff, who had also been declared a bankrupt, as well as of *George*. To meet this defence, the plaintiff attempted to contest his own bankruptcy, as well immediately, by shewing that the commission, which had been sued out upon the petition of the defendant, as assignee of *George*, for a debt of 100*l.* sworn to have been due from the plaintiff to *George*, could not be supported, because that debt did not exist; as mediately, by impugning the commission issued against *George*, in order to shew that whatever rights *George* might have, they had not been duly transferred to the defendant. The defendant, however, insisted, that as the plain-

The notice of intention to dis-  
pute a bank-  
ruptcy, re-  
quired by stat.  
49 G. 3. c. 121.  
s. 10. may be  
served on the  
assignee by de-  
livery to his  
attorney.

But service  
by leaving the  
notice with a  
maid-servant  
at the dwelling-  
house of the  
assignee is not  
sufficient ser-  
vice.

1811.

HOWARD  
v.  
RAMS-  
BOTTOM.

[ 527 ]

the plaintiff had given him no notice of his intention to contest the bankruptcy of *George*, he could not be now permitted to impugn that commission. It was proved, that a twofold notice of the plaintiff's intention to dispute the commission against himself had been given: first, by service, whether before or after the time of issue joined did not appear, of a notice to the defendant at the defendant's house, delivered to a maid-servant, the defendant not being then at home; but the plaintiff did not prove that the notice did, and the defendant did not prove that it did not, come to the defendant's hands: secondly, by a like notice served upon the defendant's attorney, long after issue joined, a few days only before the trial. The debt upon which the commission against *Howard* had issued, was sworn by *George* at the trial to have been 60*l.* of *George's* own money, furnished by him to the plaintiff, to enable the plaintiff to go out on a journey, and 40*l.* expended by himself on another journey, for the plaintiff's benefit. The plaintiff and *George* had been partners in various transactions. They took these journeys for the purpose of purchasing goods of unwary persons, for which they never paid, but resold them, and converted the money to their own use. It appeared that before the time when this sum was said to have been paid by *George*, the commission had issued against him. *Mansfield*, C. J. thought it utterly incredible that he had advanced this money separately, and not as partnership stock. It was objected for the defendant, that the plaintiff's notice of intention to dispute his bankruptcy, ought to have been served on the defendant in person; but no objection was taken at the trial, as to the time when the notices were served, with reference to the time of issue joined. The jury found a verdict for the plaintiff subject to the point reserved, whether the manner of service of the notices were sufficient.

*Shepherd*, Serjt. accordingly in *Hilary* term moved for a rule *nisi* to set aside the verdict and enter a nonsuit, as well on the ground that the manner, as that the time of service of the notice being irregular, the plaintiff was precluded by the statute 49 G. 3. c. 121. s. 10. from contesting his own bankruptcy, and also upon the ground that the debt due to the petitioning creditor for the plaintiff's commission, was well proved; for that the money was paid after *George's* bankruptcy, and therefore was at that time the money of his assignee, subject only to an account with the partnership. The Court said, that the objection

jection to the time of serving the notice not having been taken at the trial, the defendant could not now avail himself of it, but granted a rule *nisi* upon the other two grounds.

\* *Best* and *Marshall*, Serjts. in this term shewed cause. The plaintiff shewed a *prima facie* title. The defendant endeavoured to shelter himself under the title of *George*; it was therefore incumbent on him to prove that *George* had possessed rights which had vested in him, which he failed to do, for the evidence of *George* was incredible. There was no proof of the debt due from *George* to the defendant, upon which the commission against *George* issued. With respect to the service of the notice, the act of 49 G. 3. c. 121. does not require personal service; the words are, "that the plaintiff shall, before issue joined, give notice in writing to such assignee." Where the law requires service of a notice, service at the dwelling-house has been held sufficient. By Lord *Kenyon*, C. J. *Jones on demise of Griffiths v. Marsh*, 4 T. R. 464. It would be attended with so much difficulty, as to be the means of defeating this act, if it were necessary in all cases to serve these notices upon an assignee in person, whose person may not be known to the bankrupt, or who may be in a distant part of the world. A general line of distinction prevails as to notices, that where they are to be followed by a criminal proceeding, the notice must be personal; in all other cases, the notice may be given to the attorney.

*Shepherd* and *Vaughan*, Serjts. *contrâ*. It never was put to the jury whether they disbelieved the evidence of *George*. [*Lawrence*, J. The 40*l.* expended on journies was never paid to *Howard*, but to various innkeepers and others on the road; to them the assignee of *George* must resort to recover back that part of the sum.] In all cases except one, where any statute requires a notice to be given, it gives some alternative direction. Thus the statute 24 G. 2. c. 44., requiring notice of action to be given to magistrates, directs that it may be served either on the principal or on his attorney, or left at his usual place of abode. So the statute 25 G. 3. c. 70. s. 29., for protecting excise officers, directs the notice of action to be "delivered to the officer, or left at his usual place of abode." So the statute 32 G. 2. c. 28. s. 13., for relief of debtors, requires notice to be "given or left unto and for all and every the creditor and creditors, at whose suit the prisoner stands charged in execution, or his, her, or their executors or ad-

Vol. III.

C c

"ministrators,

1811.

HOWARD

v.

RAMSBOTTOM.

[ \* 528 ]

[ 529 ]

1811.

HOWARD  
v.  
RAMS-  
BOTTOM.

"ministrators, and at his, her, or their usual place of abode, "or to or for his, her, or their attorney or agent." The statute 2 G. 2. c. 23. s. 23., respecting attornies' bills, requires them to be "delivered to the party or parties to be charged therewith, or left for him, her, or them, at his, her, or their "dwelling-house or last place of abode." The excepted case is that of 2 G. 2. c. 22. s. 13. directing that notice of set-off "shall be given," without saying to whom it shall be given. The case of *Doe d. Griffith v. Marsh* is the case of a notice required at common law, where the Court is to judge of the reasonableness of the notice, but that rule does not apply to the express words of a statute. In the case of *Vincent v. Slaymaker*, 12 East, 372., Lord *Ellenborough*, C. J. thought that a delivery of an attorney's bill to the new attorney of the party sought to be charged, was not a sufficient delivery. And it is observable, that upon all these statutes, except the lord's act, it would usually happen, that at the time when the notice is required to be given, the party entitled to receive it would not have retained any attorney in that transaction to which the notice referred. In *Hill v. Humphreys*, 2 Bos. & Pull. 343. it was held that the leaving an attorney's bill at the defendant's counting-house was insufficient.

*Best* replied, that in *Vincent v. Slaymaker* the three other Judges held the service sufficient.

[ 530 ]

MANSFIELD, C. J. The point is very important, as it must frequently occur, and the practice ought to be uniform. As to the statute requiring notice of set-off, it is perfectly clear how that statute must be construed; for the notice is to be given at the time of pleading, therefore it must necessarily be given to the attorney; and certainly, if nothing in this act confines the notice to be given to the assignee personally, notice to the attorney is, in point of common sense, much preferable.

*Cur. adv. vult.*

MANSFIELD, C. J. on this day delivered the opinion of the Court.

This act of parliament requires the notice to be given to the assignees, and the question is, whether those words intend personal notice. In this case it appears, that the notice was served in two modes: first, by serving a notice upon the defendant's attorney, and secondly, by delivering the notice at the house of the defendant, the assignee: respecting the latter, a notice left at a man's house, with a maid-servant, may very possibly never find

And its way to the master of that house; wherefore, if it depended on that only, we certainly should say that that service was not sufficient; but then, the question is, whether the notice given to the attorney is not sufficient. The act, in its wording, is a good deal like the words of the statute of set-off. As to the time of pleading, and joining issue, the assignee or defendant himself knows nothing: he leaves all that to his attorney. As to all these dates, to which both the acts refer, depending, as they do, on the progress of the proceedings, the party knows nothing, the attorney is the only person who knows; therefore the notice given to the attorney is the best notice that can be given for practical uses; and the

Rule must be discharged.

1811.

HOWARD  
v.  
RAMS-  
BOTTOM.

### WINTER v. MAIR.

[ 531 ]

May 27.

THIS was an action of *indebitatus assumpsit*, brought by a broker, to recover a recompence for having chartered three vessels for the defendant. Upon the trial of the cause at *Guildhall*, at the sittings after *Michaelmas* term 1810, before *Mansfield*, C. J., it appeared that by the charter-party the vessels were to go first from *London* to *St. Ubes* for a cargo of salt, and thence back to *Sheerness*, and thence to *Stockholm*, or some port in the *Baltic*, with several ports of further destination, dependent on a market and the discretion of the freighter; and in case the ships should discharge their salt at *Riga*, and bring home a cargo, and discharge it at *Liverpool*, the freight was to be 5000*l.*, and in case they should discharge the salt at certain other ports in the *Baltic*, and bring home and discharge a cargo at *Liverpool*, then the freight was to be 4500*l.*, and if they discharged their cargoes at *London* or on the *Eastern* coast of *Great Britain*, the freight was to be four thousand pounds. The plaintiff proved by several witnesses that it is the practice, that brokers who charter a ship outwards, shall have the benefit of delivering the same ship upon her return home, and that the rate according to which they had paid for their services, is, that they receive upon the ship's sailing, two and a-half *per cent.* commission upon the amount of the freight outwards, and upon her return two and a-half *per cent.* more upon the amount of the freight home again. Other witnesses proved a commission

A broker chartered ships, at a commission of two and a-half *per cent.* on their outward freight, and the like on homeward freight: if the charter-party makes it contingent what the amount of freight shall be, the broker cannot sue for any sum till the contingency is determined.

If a junior counsel at *nisi prius* takes a well-founded objection to the defendant, which his leader gives up, the Court will not entertain it, in discussing a rule for a new trial or nonsuit on another ground.

1811.  
 ———  
 WINTER  
 v.  
 MAIR.  
 [ 532 ]

of five *per cent.* upon the freight out and home, half to be paid when she sails, and half when she returns. But all agreed that the broker was paid by a *per centage* upon the freight contracted for. The vessels sailed and got to *St. Ubes*, and thence back to *Sheerness*, but had not proceeded further. The jury gave the sum to which the plaintiff would have entitled himself by this rule, in case the vessels had earned the highest freight covenanted for, under any of the destinations mentioned in the charter-party.

*Peckwell*, Serjt., in *Hilary* term, obtained a rule *nisi* to set aside the verdict and have a new trial, upon the ground that as the amount of freight was contingent in this case, the jury had either taken a wrong rule of damages, or had given a verdict discordant to the rule. If the plaintiff had made so absurd a contract that the freight could not be calculated, he must abide by the consequences. The Court granted a rule *nisi*.

*Shepherd* and *Best*, Serjts. shewed cause. There is no uncertainty in the rule for calculating the broker's commission. The confusion arises from considering it as dependent on the freight actually earned, whereas it is in truth dependent on the opportunity given of earning freight, the plaintiff therefore was entitled to his commission upon the highest freight that the parties contemplated. Or if there is any difficulty in ascertaining the amount, at all events he is entitled to the commission upon the lowest of the sums, for the broker's duty is finished as soon as the ship is afloat, and the commission then becomes due. [*Mansfield*, C. J. There was no evidence of any broker, that where there were two contingent sums named for freight, the broker was entitled to the commission on the larger sum.] As the voyage was defeated by the act of the defendant, the plaintiff is entitled to the larger sum.

[ 533 ] *Vaughan*, Serjt., and *Peckwell*, *contra*. All the witnesses agreed that the amount of the brokerage is to be determined by the amount of the freight contracted for, and the latter cannot, under this charter-party, be known until the ship's return at the end of the voyage. If, therefore, the plaintiff chose a measure of compensation dependent on a contingency, he must wait until that contingency happens before his commission can be ascertained: consequently this action is prematurely brought. If he had deserted this contract, and gone upon a *quantum meruit*, he might, perhaps, have recovered something, but at the trial he expressly repudiated that claim.

MANSFIELD, C. J. It is now too late to contend that the plaintiff is not entitled to recover something, for that objection was never insisted on at trial. [*Peckwell* said that he made the objection, but his leader, *Cockell*, Serjt., abandoned it.]

LAWRENCE, J. No special contract was declared upon, but the plaintiff asks for the measure of damages, according to the rule which he proved at trial, which is to be, according to the freight when ascertained; but that cannot be recovered on until the freight is ascertained. As this point, however, was not insisted on at the trial, the defendant is not now entitled to a nonsuit.

The Court recommended to the parties to compromise the action, upon payment of the commission according to the smallest amount of freight contemplated; and on this day, they having agreed to it, a rule was made to reduce the damages accordingly, and the rule for a nonsuit was

Discharged.

---

JACOB V. JANSEN.

1811.

WINTER  
v.  
MAIR.

[ 534 ]  
May 27.

THIS was an action upon a policy of insurance, dated the 11th June 1807, at and from *London* to the *South Seas*, and back to *London*, with liberty to touch, discharge, and take in goods at all ports and places in the course of the voyage, whether in the *English* channel, at *Madeira*, *Cape De Verd Islands*, *St. Helena*, the *River Plate*, or elsewhere, also with like liberty at any port or ports in *South America*, as well on this side as on the other side of *Cape Horn*, and during her voyage and trading, with leave to barter, sell, and exchange property, notwithstanding the colonial laws of *Spain*, upon the ship *Memphis*, with liberty to chase, capture, man, and convey any vessel or vessels, and to seek, join, and exchange convoys: the value was thereafter to be declared by the assureds: upon the trial of this cause, at the *London* sittings after *Michaelmas* term 1810, it was proved that the ship *Memphis* was a trading vessel, and not a fishing vessel, that she sailed on the voyage insured, in company with the *Hero*, on a trading adventure, and on the 12th July left *Madeira*, and continued in her company until the 24th, when they parted, and the *Memphis* had not since been heard of. It was objected for the defendant, that the master of the vessel had not procured a licence from the

The statute 43 G. 3. c. 77. has repealed the necessity of a licence from the *South Sea* Company or *East India* Company for ships passing through the *Streights of Magellan* or round *Cape Horn*, and trading in the *Pacific Ocean*, from *Cape Horn* to 180 degrees West longitude from *London*. Whether they combine fishing with their trading or not.

*South*



1811. *South Sea Company*, and that for want thereof the voyage was illegal. The jury, however, found a verdict for the plaintiff for a total loss, subject to this objection.

JACOB  
v.  
JANSEN.

*Lens*, Serjt., in *Hilary* term 1811, accordingly obtained a rule *nisi* to set aside this verdict and enter a nonsuit; against which

[ 535 ] *Shepherd* and *Best*, Serjts., on a former day in this term, shewed cause. They contended that a licence from the *South Sea Company* was unnecessary in this case, by virtue of the statute 42 G. 3. c. 77, which is entitled "an act to permit " *British* built ships to carry on the fisheries in the *Pacific Ocean*, without licence from the *East India Company* or the " *South Sea Company*;" the preamble of which recites, "that " it may tend to increase the navigation and fisheries of his " majesty's subjects, if the restrictions then subsisting with " regard to ships navigating in the *Pacific Ocean*, between " *Cape Horn* and 180 degrees of *West* longitude from *London*, " should be removed," and enacts, "that thenceforth it should " be lawful for any *British* built ship, owned and navigated " according to law, to pass through the Streights of *Magellan*, " or round *Cape Horn*, and to carry on the fisheries in the " *Pacific Ocean*, from *Cape Horn* to 180 degrees of *West* " longitude from *London*, and to trade within the said limits, " without having obtained any previous licence, permission, or " authority for that purpose, from the court of directors of the " *East India Company*, or from the governor and company of " merchants trading to the *South Seas*." It is important to attend to two former acts which related to fishing alone, and to mark the distinction between them. By the statute of 35 G. 3. c. 92., entitled "an act for further encouraging and regulating " the *Southern* whale fisheries," s. 26., all ships intending to navigate within, or frequent any part of the seas comprized in the boundaries of the exclusive trade of the *South Sea Company*, as described in the stat. 9 Ann, c. 21., are required, "before " they shall proceed on any such voyage, to take a licence for " such voyage from the *South Sea Company*." And by 38 G. 3. c. 57., which is entitled "an act for further encouraging the " *Southern* whale fisheries," the preamble of which, as well as of the last-mentioned act, recites that it was "proper to encourage " the fishery carried on by his majesty's *European* subjects in " the seas to the *Southward* of the *Greenland* seas and *Davis's* " *Streights*, for the purpose of taking whales, and other crea-

[ 536 ] " tures

"tures being in those seas," and refers to the 35 G. 3. c. 92., it is enacted in the third section, that for extending the limits prescribed in the last recited act for the *Southern* whale fisheries, any ship fitting and clearing out, and licensed, conformably to the act of 35 G. 3., and sailing to the *Eastward* of the *Cape of Good Hope*, might pass beyond 51 degrees of *East* longitude from *London*, provided that such ship, after passing 51 degrees of *East* longitude from *London*, should not sail or pass to the *Northward* of 15 degrees *Southern* latitude, till she shall have sailed to the *Eastward* of 180 degrees of *East* longitude. And by the next section, any vessel fitting, and clearing out, and licensed, conformably to the said act, and sailing to the *Westward* of *Cape Horn*, or through the *Streights of Magellan*, for the purpose aforesaid (of fishing), may pass beyond 180 degrees of *West* longitude from *London*, provided such ships, when they have passed beyond 180 degrees of *West* longitude from *London*, do not pass to the *Northward* of 15 degrees *South* latitude, until they come within 51 degrees of *East* longitude from *London*. They admitted that the two earlier acts, which had for their object merely the encouragement of the fisheries, did not dispense with the necessity of a licence; but the 43 G. 3. had a much larger scope. It was intended to give free licence to trade with the *Spanish* colonies, which was contraband by the laws of *Spain*, in such a manner, as not to give alarm to that jealous government; and with that view the preamble was made much more comprehensive than the title of the act, and the purview much more comprehensive than the preamble. [*Mansfield*, C. J. Would not the inhabitants of *Spain* be as likely to read the body as the title and preamble of the act?] The true construction of the act is, that it shall be lawful for all *British* ships navigated according to law, which refers only to the navigation laws, and not the rights of monopoly, to fish within those limits, and also that it shall be lawful for all *British* ships navigated according to law, to trade within the same limits: it is no more necessary that trading ships should fish, in order to entitle themselves to the benefit of the statute, than it is that fishing ships should trade, in order to bring themselves within the same indulgence. It may be admitted that the two statutes for the extension of the fisheries, so far as they invade the monopoly of the *Eastern* hemisphere, have extended the indulgence to fishing vessels only, but that is not so with regard to this statute,

1811.

---

 JACOB  
v.  
JANSEN.

[ 597 ]

1811.

JACOB

v.

JANSEN.

statute, and there is this substantial reason for the difference, that the *East India Company* are of themselves competent and sufficient to carry on the trade, whereas the *South Sea Company* have no trade, and therefore cannot be losers by the extension of the trade to others; therefore it was the object of government to lay open to the subjects at large, as well the trade as the fisheries of the *Pacific Ocean*. It is so beneficial to this country to extend the limits of trade, that the Court will, if possible, adopt the construction which favours it. Neither any grammatical, nor any reasonable construction, confines that trading to fishing ships.

*Lens, Serjt., contra*, urged, that although in certain cases the enacting part of a statute may extend its operation much more widely than the preamble, yet that must be in cases where the intention is clear. If the plaintiff's construction be correct, the statute 47 G. 3. sess. 1. c. 23. was wholly unnecessary. The principal object of this act 42 G. 3. was the fishery, and if it embraced trade, it was only subservient to the fishery, or as giving liberty to trade if the ships were disappointed of fish: but it must be construed as restraining that liberty to fishing vessels. Until the passing of this statute the monopoly of the trade of both hemispheres was clearly protected from interlopers, unless they were licensed: it is not pretended that the trading monopoly of the *India Company* is done away; and it is not to be intended that the legislature meant to deprive the *South Sea Company* of their exclusive monopoly of the *Western* hemisphere in this covert and ambiguous way. It is clear that the persons who penned the statute 47 G. 3. sess. 1. c. 23. understood that the monopoly of both Companies still subsisted, otherwise they would have confined the repeal of the 9 Ann. c. 21. to such conquered countries as are on the *East* side of *America* only, instead of repeating the permission, as extended to all places which should be in his majesty's possession, as well on the *East* as the *West* coast of *America*. In the very next year, 43 G. 3., another statute, c. 90. passed, declaring in s. 2. that vessels clearing out, and licensed, conformably to the 38 G. 3. and passing to the *West* of *Cape Horn*, or through the *Streights of Magellan*, for the purpose of carrying on the fishery, and having passed beyond 180 degrees of *West* longitude from *London*, may pass to the *Northward* as far as 10 degrees *Southern* latitude, but not further, until she shall have sailed within

[ 538 ]

within 51 degrees of *East* longitude from *London*. [*Lawrence, J.* It may from that act be inferred that in certain other limits the necessity of a licence is abolished.]

**MANSFIELD, C. J.** According to the construction now contended for on the part of the plaintiff, this act 42 G. 3. is a total destruction of the monopoly of the *South Sea Company* on the *Western coast of America*. If that be so, it is very singular that it was never before discovered.

**CHAMBER, J.** Every one of these acts is to a certain degree a violation of the rights of the *South Sea Company*. Even the limited construction, restricting the indulgence to the right of fishing, is a violation. The preamble is very strong in favour of the larger construction. Navigation is mentioned as the first object, and the intention seems to be to remove the obstructions to vessels navigating the *Pacific Ocean*.

*Cur. adv. vult.*

**MANSFIELD, C. J.** now delivered the opinion of the Court.

Considering, as we do, that the act of parliament was made for the benefit of trade, as well as of the fisheries, and considering the questions that may arise on the point, what degree of fishing is necessary to authorize a ship to trade, if we should hold it necessary that a ship should both fish and trade, we think it better to decide, that a ship may go either for the sole purpose of trade, or for the sole purpose of fishing: therefore the

Rule must be discharged.

### GARRICK v. WILLIAMS and Others.

[ 540 ]

May 20.

**LENS, Serjt.** had on a former day in this term obtained a rule nisi to cancel the warrant of attorney which had been given in this case to secure an annuity, and to set aside the judgment entered up, and execution levied thereon, and restore the money upon the affidavit of a surety, which stated, that in 1806 the deponent became surety for the payment of an annuity of 100*l.*, then granted by the defendants *Williams* and *Barnes* for their respective lives to the plaintiff, and with that intent signed certain deeds. That the deponent in *November* 1810 applied to the inrolment office

If a correct memorial of an annuity-pled be incorrectly inrolled for a time, and after some years the officer of the inrolment office discover and rectify the error before any proceedings had to vacate the annuity,

the Court finding the inrolment right when they call for it, will not inquire when the entry was made. But it is a high misprision in an officer to alter the inrolment without the sanction of the Court of Chancery.

Whether it be sufficient for the grantee of an annuity to carry a memorial to the inrolment office, and pay for it, without insisting on himself seeing it inrolled, and comparing the inrolment with the original memorial, *q. are.*

for

1811.  
 ———  
 GARRICK  
 v.  
 WILLIAMS.

for a copy of the record of the memorial, and thereupon received from the clerk at the inrolment office a copy thereof, which did not contain the names of the witnesses to the bond, nor any authority to any attorney to enter up any judgment against the deponent, nor any term, nor any date to such supposed authority; and the deponent thereupon examined the copy with the memorial inrolled, with which, he found, it corresponded with respect to such defects. The attorney for the defendants swore that the copy of the memorial which he annexed to his affidavit was a true copy of the record, as it was in *November* 1810 entered on the rolls of the office, and that the inrolment then corresponded with respect to such defects. That having reason to believe that the memorial inrolled had been altered subsequently to the time of his former examination, the deponent had lately again inspected it, and discovered, that an addition had been made to the record, and that the names of the witnesses to the bond, and an authority to certain attorneys to appear for the defendants, and confess judgment, and the date thereof, had been inserted in the margin of the roll, subsequently to *November* 1810, and more than four years after the execution of the deeds and other instruments signed and given for securing the annuity.

[ 541 ]

*Best*, Serjt. shewed cause against this rule, upon an affidavit of one of the entering clerks in the inrolment office, that in consequence of the error in the memorial being pointed out to him by the defendant's attorney, he rectified it, and offered to rectify the defendant's copy of it accordingly, which was refused; and that it was the common practice of their office, if they discovered any error in the inrolments of memorials, to rectify them by insertions in the margin of the roll. That when an original memorial is brought into the office, the hour and day are immediately marked on it, and that from that time forward the inrolment is considered as complete. The attorney for the annuitants swore, that the original memorial, which he deposited in the office, had not these defects. *Best* contended, that if a correct memorial were left at the office within the 20 days, the annuitant had completed his title; the officer might inrol it at any subsequent time that suited his convenience; and when inrolled, the inrolment would have relation back to the time of leaving the memorial in the office. If the bargainee of an estate were to be answerable for the due inrolment of a bargain and sale by the officer, after he had left his instructions at the office, it would shake half the titles in the kingdom. The statute 17 G. 3. c. 26.

s. 5. directs, that the memorials shall be inrolled in order of time as the same shall be brought to the office. If an annuitant carries his memorial on the 20th day, and finds only one clerk in the office, who has five hundred previous memorials then to be inrolled, it would be very hard that the grantee should therefore lose his annuity. No person can be injured by the mistake; for either party who wished to act upon it, must obtain an office copy, and in comparing that copy with the original memorial, as the practice is, the mistake would be discovered and rectified, as was the case here. This annuity had subsisted four years, had been assigned for a valuable consideration, and one of the attesting witnesses, who might have proved all circumstances relating to the consideration, was since dead. The certificate indorsed on the deed records the inrolment as made on the 7th day of *August* 1806, at seven in the evening, pursuant to act of parliament, and is signed by the proper officer.

*Lens*, in support of his rule. The officer who signs this certificate, is mistaken in taking it for granted, that the leaving the memorial at the office is the act of inrolment. The fact of assignment makes the case stronger against the annuitant; for if he had used ordinary diligence, he would have discovered the mistake at the time of his examining the title. The question does not here arise, whether the officer could perfect the memorial a day or two after the 20 days are elapsed; for the plaintiff's argument goes to the extent, that if the memorial be left in the office, though it be never inrolled at all, the annuity shall be good. But the words of the statute are imperative, that it shall be inrolled within the 20 days; and if it is not done within that time the securities are avoided. The objection is not, that the copy is incorrect, but that the original, the roll to which the public have resort for inspection, and by which they are to be guided, in order to know whether all things are duly done, is incorrect. The object of the act is, that the public shall have access to the contents of the inrolment: the sum paid, too, for inrolment, and for a copy, and which is regulated by the number of words, will vary if the memorial be incorrectly inrolled. *5 Co. 84. Berriman's case.* The custom of the manor was that alienations should be presented at the manor court within a year. The Court said, *caveat emptor*, he is at his peril to perfect all that is necessary for his assurance. It was incumbent on the grantee to see this done, and the neglect of the officer is the misfortune of the grantee, who may have an action against the officer

1811.

GARRICK  
v.  
WILLIAMS.

[ 542 ]

[ 543 ]

1811.  
 GARRICK  
 v.  
 WILLIAMS.

officer for his negligence, but the securities are, in the words of the act, wholly null and void. The quantity of business with which the office is filled, is no reason why it should not be inrolled in due time, for the statute gives a profit to the officer for making the inrolments, and the amount of the fees is according to the length and number of the memorials: having therefore a profit for his duty, he is bound to discharge his duty, and is bound at his peril to provide a sufficient number of clerks and servants to inrol the memorials within 20 days as fast as they come in. The objection is not here that the memorial was not inrolled within the 20 days, but was inrolled within a reasonable time after; but the objection is, that it was falsely memorialized within the 20 days, and that the fallacy has subsisted for four years. The statute could not intend that it was sufficient for the grantee to leave his instructions at the office.

*The Court* strongly reprobated the conduct of the officer, in thus signing a certificate, which was clearly false, and said that he was guilty of gross negligence, and that he ought not to have made the alteration without the consent of the Court of Chancery.

*Cur. adv. vult.*

MANSFIELD, C. J. now delivered the opinion of the Court.

[ 544 ] This was a motion to set aside a warrant of attorney and judgment given for securing an annuity, on the ground that it is void under the statute, for want of a memorial being inrolled in due time; and the representation is, that a perfect memorial was prepared and carried to the office within 20 days, but that the roll itself, when first looked at, did not contain certain material parts of the memorial, but that now when the motion is made, the roll does contain a correct copy. This is the first time this question has been agitated, and it is attended with considerable difficulty. The framers of this act did not at all know what they were requiring, in having these memorials inrolled; probably they thought a memorial would be a very short thing, and that many might be inrolled in a very short time; but the various very minute and nice questions which have arisen on the act have introduced a practice, (and I see not how it can be avoided,) of copying almost the whole of all the instruments on the roll. Now it might be impossible for the officers, every day, or even every month, to put these on the roll. The act requires that a memorial shall within 20 days be inrolled, and section 5. directs, that there shall be a particular roll provided and kept, on

on which such memorial shall be entered, and proceeds to enact, "that every such memorial shall be duly inrolled, in order of time, as the same shall be brought to the office, and that the clerks of the inrolments, or their deputy, shall specify on the roll the certain day, hour, and time on which the memorial is brought to the office, and shall grant a certificate of the inrolment thereof when required." If this act of parliament, as it stands, were peremptory that the inrolment should be made and completed within the 20 days, and never be altered, it requires an impossibility, for it can never be done; it must be enough, therefore, if the deed is brought in due time, and left for inrolment when the officer can do it. The question is whether the Court, finding the record to be now right, will say that the inrolment was insufficient, and overturn the annuity, the record being correct; and we think that the Court, finding the record now correct, ought to be satisfied, and inquire no further. There have been questions in the old law on the statute of inrolments, which sustain us in the doctrine that we should look to the roll only and no further; in *Hinde's case*, 4 Rep. 71. one question was, amongst others, whether any averment could be received with respect to the time of the inrolment, and whether that could be pleaded as a matter *in pais*, or must be decided merely on the record; the party by his demurrer confessed the inrolment was made after the fine, and so the fine operated, and the bargain and sale did not operate; and there being no attornment, no action of waste could be maintained in respect of that estate; and whether the estate could pass by the bargain and sale, not being inrolled within the time, was the question; and it was held it could not. *Gillb. on Uses*, says, "As to averring an inrolment, this must be understood when the time of inrolling was not entered on the record; but since 16 *Eliz.* the date of the inrolment has been entered. *Mod.* 504. 1 *Leon.* 582. are cited, and are nothing to the purpose; but in *Sir T. Howard's case*, *Owen* 132. the same point appears to be ruled; and so we think that the memorial on which these annuities are inrolled shall be conclusive, and that no averment or evidence shall be received to shew that the date is incorrect; and according to these cases we must say, that the memorial was inrolled within 20 days, and therefore the

1811.

GARRICK  
v.  
WILLIAMS.

[ 545 ]

Rule must be discharged.



1811.

May 27.

“Under a licence to British brokers resident here, that a ship bearing any flag may import from an enemy’s country, to whomsoever the property may appear to belong, three British subjects, not named in the licence, one of whom resides in a hostile country, may import from another hostile country to this.

And the agent who effected the policy, may recover in trust for three British partners, one of whom, at the time of the action, resides in an alien enemy’s country.

## FAYLE and Another v. BOURDILLON.

[ 547 ]

THIS was an action upon a policy, effected by the plaintiffs as agents, as well in their own names as for and in the name and names of all and every other person and persons to whom the same did or might appertain, in part or in all, at and from *St. Petersburg* to *London*, with or without simulated papers or licences, upon the ship *Sophia Carolina Albertina*, at the rate of twenty guineas *per cent*. The insurance was declared to be “on goods, as interest might appear, to be thereafter declared and valued.” The plaintiffs averred the loading of a cargo of the value of 4130*l.* at *St. Petersburg*, and that *Macnab*, *Stewart*, and *Barclay* were interested in the goods to the amount insured, and that the insurance was made for their use and benefit, and that by a memorandum afterwards indorsed on the policy, the interest was declared to be in them, and the goods were valued at 4130*l.*, including premium of insurance, commission and all charges incident to a loss. The plaintiffs then averred in their first count, a loss by perils of the sea, and in the second, a loss by hostile force. Upon the trial of this cause, at *Guildhall*, at the sittings after *Trinity* term 1811, before *Mansfield*, C. J., it was proved that *Stewart* resided at *Hamburgh*, *Barclay* at *Glasgow*, and *Macnab* at *Gottenburgh*, and that they were partners in trade. It was proved that upon the petition of the plaintiffs, a licence had been granted by the privy council, to “*Benjamin Fayle and Company, merchants*,” thereby “permitting a vessel, bearing any flag, to proceed with a cargo of such goods, as by law are permitted to be imported, from any port in *Russia*, *Prussia*, or *Denmark*, to any port in this kingdom: the master to be permitted to receive his freight and depart with his vessel to any port not blockaded, notwithstanding all the documents that might accompany the ship and cargo might represent her to be destined to any other neutral or hostile port, and to whomsoever such property might appear to belong,” under the usual provisions for indorsing, &c.; the licence was dated on the 11th of *May* 1809. *Stewart* wrote a letter from *Hamburgh* on the 8th of *July*, apprizing the plaintiffs that he had chartered the ship *Sophia Carolina Albertina* to go from *Rostock* in ballast to *Petersburgh*, for a cargo of flax and hemp, which would be addressed to the plaintiffs, and giving them instructions “to effect an insurance thereon from *St.*

*Petersburgh* to *London*, either on receipt of the letter, or on the ship's arrival in *London*, at their discretion, adding that perhaps they could get 3000*l.* provisionally covered better now than later in the season;" in consequence of which letter the plaintiffs effected the insurance in question on the 24th of *July*. The vessel took in her cargo at *St. Petersburgh*, and was lost on the homeward voyage. The bills of lading were consigned to the plaintiffs, but they were not interested in the goods. *Stewart*, *Macnab*, and *Barclay* were all *British* subjects. The action was commenced in *January* 1811. No evidence was given of the relations of amity or otherwise at that time, or at the time of plea pleaded, or trial had, existing between *Hamburgh*, *Sweden*, and *Great Britain*; but the counsel for the defendant assumed it as a fact of which the Court had judicial notice, that *Hamburgh* and *Sweden* were both in a state of hostility with *Great Britain*, and that therefore *Stewart* and *Macnab*, although *British* subjects born, were alien enemies, and they raised upon this ground two objections to the plaintiffs' right to recover first, that no action could be maintained to recover money for the benefit of alien enemies; secondly, that the licence which had been granted, did not legalize the trading by alien enemies, upon which this insurance was effected, but was confined to *Fayle* and *Co. Mansfield*, C. J. reserved both these points, subject to which the jury found a verdict for the plaintiffs.

1811.

FAYLE

BOURDILLON.

[ 548 ]

*Best*, Serjt. having, on a former day in this term, obtained a rule *nisi* to set aside the verdict and enter a nonsuit,

*Shepherd* and *Vaughan* Serjts. shewed cause. As to the effect of this licence to legalize the trade, when the policy was effected, there was no war subsisting between *Great Britain* and *Sweden*, and the partner resident at *Hamburgh* undoubtedly is not an alien enemy; but even if the partners had all been resident at *Petersburgh*, between which country and *Great Britain* there is undoubted war, this licence, the purpose of which is, to do away the disabilities incident to a state of warfare, would have legalized the traffic. The object of these licences is to facilitate the importation of particular species of goods into this country, no matter to whom they belong; whether to an enemy resident in the exporting state or to others. The owner and the goods are equally adopted as *British* by this licence. There are sound reasons for not introducing into the licence the names of the traders, for the licence must be on board the ship, and might fall into the hands of the enemy, at all events

1811. events copies may be legally obtained here by the enemy's agents, and to insert the names would subject to confiscation and the heaviest punishments, the goods, and the importers or exporters, if discovered and taken in any country over which *France* exercises her domineering influence. All trade with any foreign state is reduced to this, that either the *British* merchant must send out his ship with ballion to purchase commodities, or that foreigners, as consignors or consignees at the foreign ports, either on their own account or as agents, must participate in the trade. Many licences require a cargo to be first exported, and legalize the importation of a return cargo only, many require the goods imported to be the property of the person licensed, as in *Feise v. Thompson*, ante, 1. 121., or the property of the bearer of their bills of lading, as in *Defflis v. Parry*, 3 *Bos. & Pull.* 3. The words of this licence are most general, and most cautiously worded to avoid being restricted to any individual or class of men whatsoever, so long as the possessor of it properly and legally comes by the possession. It is not a licence, that the plaintiffs may import, but it is granted to the plaintiffs that a ship may come from an hostile port, bearing any flag and freighted with any man's property. This licence is therefore transferable to any person, whatever be his political relation, to whom the plaintiffs, in the exercise of that discretion which the government has reposed in them, shall think fit to communicate that benefit. In *Kensington v. Inglis*, 8 *East*, 273., it was held that the plaintiff might recover on a declaration averring interest in *Juan Villas*, an alien enemy, the adventure being legalized by a *British* licence, because that traffic could not be carried on but in *Spanish* vessels. They referred largely to the judgment in *Usparicha v. Noble*, 13 *East*, 332. As the trade would be authorized therefore by this licence, if the goods were wholly the property of an alien enemy, so it can be no objection that an alien enemy, has a part interest in them. A *British* subject too, though resident in an enemy's country, may still be a subject, for all the purposes of being a partner in a house of trade here, and of trading, as from that house; as he may, on the other hand, be an alien enemy, so far as he mixes himself with the commercial transactions of a house of trade in an enemy's country. Case of *Jonge Glassina*, 5 *Rob.* 299., Sir *W. Scott* held that a licence to Mr. *Ravie*, of *Birmingham*, to import hither from *Holland*, did not legalize an adventure by Mr. *Ravie* of *Amsterdam*, as a *Dutch* exporter.

Therefore,

Therefore, in this case, the two national characters which *Macnab* possessed of *Swede* and *Englishman*, may be severed; and it was perfectly lawful for *Stewart*, *Macnab*, and *Barclay* of *Glasgow*, to import these goods from *St. Petersburg* into *England*, to insure them, and to enforce the policy by an action in the name of their broker for their benefit, although the same things would not have been lawful to *Stewart*, *Macnab*, and *Barclay*, of *Gottenburgh*. But at all events a contract made with an alien not in a state of war is legal, and may be recovered on, so that the plaintiff is entitled to recover at least for the interest in two thirds of the cargo, the shares of *Stewart* and *Barclay*.

*Best, contra.* The rule must be made absolute on both grounds. First, that the licence does not protect this property. Secondly, that two of the three persons, in trust for whom the plaintiff sues, are alien enemies. As to the first ground, it is essential that the king should know how, and by whom, the trade is carried on: this is a licence to *Fayle* and Co. to import, and to no one else; the words, to whomsoever the property may appear to belong, are only an extension of the liberty to use simulated papers; they mean the ostensible appearance, not to whomsoever it shall ultimately be proved, to the satisfaction of a court of justice, that the property belongs. If the plaintiffs' construction should prevail, it must go so far, that this would be a licence to go to any port whatsoever in the whole world. If the present form of the licence, according to the sound construction, frustrates the intention of the government or of those who obtain it, that may be a very good reason why the privy council should adopt another form for these instruments, but none for departing from the sound construction. No case can be cited, where a licence granted to one man can be used by another. Licence is not in its nature assignable, even if granted by a subject. In the case of *Feise v. Thompson*, the licence was differently worded. But in the case of the *Jonge Johannes*, 4 *Rob.* 263. where the licence permitted *Bridge* and *Smith*, or their agents, or the bearers of their bills of lading, to import on board three neutral vessels, a claim was made by *Smith* on behalf of various proprietors, on the ground that he had obtained the licence in consequence of instructions from his correspondents. Sir *W. Scott* held, that a material object of the controul which the government exercises over such a trade, was, that it might judge of the particular persons who are fit to be

1811.

FAYLE  
v.

BOURDILLON.

[ 551 ]

1811.

FAYLE

v.

BOURDILLON.

[ 552 ]

entrusted with an exemption from the ordinary restrictions of a state of war. The purpose of these licences is the employment of *British* labour and *British* capital, not the employment of foreign seamen and the capital of persons resident in *Germany*. In the case of the *Christina Sophia*, cited 4 *Rob.* 12. and 267., the broker, who procured a licence to himself and company, made oath that he intended to include, under the denomination of company, all the owners of the several parts of the cargo, and "the Court acceded to the favourable suggestion, that the *Irish* government might be apprized of the intention of including all the persons, that the broker might have stated their names, and have taken the licence in that abbreviated form." But there is nothing similar in this case. The risk of the underwriter is increased by the assured not conforming to these regulations, for the vessel which has on board a cargo not so licensed, is liable to seizure by *British* cruisers and confiscation. *Hector v. Mac Connel*, 3 *Bos. & Pull.* 113., it was held that a commission of bankrupt could not be supported, which was sued out on the oath of the partners, two of whom were *British* subjects domiciled in *France*: for the petitioning creditors must have a debt for which they could sue here. The case of the *Jorge Glassina* is favourable to the defendant, for if *Macnab* of *Gottenburgh* had applied for the licence which was granted to the plaintiff, it would have been refused him. The doctrine that if a licence be extended to an alien enemy, it enables him to bring all those actions which spring out of the transaction, cannot be denied, but it renders it the more necessary, not to extend to alien enemies the benefit of such licences, without express words or necessary implication. In *Kensington v. Inglis* the licence was to *Read*, to import in any *Spanish* vessel: it followed by necessary implication, that there would be *Spanish* property embarked in that adventure, and the *Spanish* subjects to whom it might belong, were therefore virtually licensed. The same observation applies to *Usparicha v. Noble*. If the plaintiff cannot recover the whole, he cannot recover a part, for the Court has no means of ascertaining what share belonged to one and what to another partner, nor of apportioning the verdict. No grant of the king can take effect, unless it be made upon a full knowledge and disclosure of all circumstances. It is impossible the king should know for whose benefit the transaction is carried on, when the licence is thus worded and thus transferred.

[ *Mansfield*,

*Mansfield*, C. J. The same objection would have militated against the judgment on the *Christina Sophia*.]

1811.

*Cur. adv. vult.*

FAYLE

v.

BOURDILLON.

MANSFIELD, C. J. now delivered judgment. The case of *Deffis v. Parry* so far resembled this case, that *Bridge* and *Smith* had no interest in the cargo, but they were the consignees of it, as *Fayle* and Co., in this case, are the consignees of the goods. But on the whole, considering the terms of this licence, it seems to us that it does not found any objection which the underwriters can take, to prevent the plaintiffs' recovering on his policy. The words of the licence are as general as it is possible for them to be; they are without reference to the goods being the property of any particular persons. The words of the licence are, "we hereby grant this licence to *B. Fayle* and Co., merchants, for the purposes specified in the order of council, and do hereby permit a vessel, (not any particular person's vessel,) to sail, &c." Under this licence goods are imported from *Russia*, consigned to *Fayle* and Co.; they are the consignees, and are the very persons who applied for this licence and obtained it. The transaction exactly corresponds with this licence, and probably this was the very sort of trade the licence was meant to legalize. Trade with *Russia*, *Prussia*, and *Denmark*, must be carried on either by *British* agents resident here, or by the inhabitants of those countries: but whichever of the two put the goods on board the ship, it seems to have been the very intention of government to encourage the importation of these goods from *Russia*, *Prussia*, and *Denmark*; and probably they form the very bulk of this trade from those countries to this, therefore there may be very good reasons for making this licence so general. The question of alien enemy has nothing to do with the case; the question is, whether *Fayle* and Co. have a right now to recover the sum assured? not what they are to do with it when they have got it. The case of *Bridge v. Smith*, in *Robinson*, does not apply, for there the person importing was neither the agent of *Bridge* and *Smith*, nor held his bill of lading; therefore the

[ 553 ]

(a) Rule must be discharged.

(a) See the following case.

1811.

## ADVERTISEMENT.

*The importance of the subject discussed in the last case will warrant the Reporter in placing here another case which involved the same principles, though not immediately consequent in order of time.*

Nov. 27, 1812.

## MORGAN v. OSWALD.

A licence to *H. S.*, a British merchant, that a ship may go to an hostile port and bring home a cargo of goods, authorizes the importation of such goods, being the property of an alien enemy, subject of that hostile country, and therefore authorizes him to insure, and enforce his contract of insurance in our courts.

If the defence upon a policy be, that the licence requires the date of the ship's

[ 555 ] clearance from an hostile port to be indorsed thereon, and that it is not truly indorsed; it is incumbent on the defendant to prove what a clearance is, and the discrepancy between the real date of the clearance and the date indorsed.

If the date be indorsed as the 17th, and the real date of the clearance be the 20th. *Seemeth* that it is a substantial compliance with the condition.

*Query* whether a clearance be any single document, or the collection of all the papers necessary to enable a ship legally to sail?

Licences to trade ought to be construed liberally.

**T**HIS was an action brought on a policy of insurance on goods shipped in the ship *America*, on a voyage from *Archangel* to *London*. Upon the trial at *Guildhall*, at the sittings after *Hilary* term 1812, before *Mansfield*, C. J., three points were made for the defendants. 1. That there was a deviation by the ship's going back to *Archangel* under stress of weather, in order to refit, it being contended that there were other ports nearer to the place where she received damage: but upon this point the jury, at the trial, and the Court on reviewing the evidence, upon the motion for a new trial, made by *Best*, Serjt. in *Easter* term 1812, were of opinion that *Archangel* was the most proper place to which she could have gone for repairs, and that there was no deviation. The second and third points upon which the defendants rested their case arose on the licence. The material parts of which were, that the undersigned *R. Ryder*, in pursuance of an order of council, specially authorizing the grant of that licence, did thereby grant that licence, for the purpose set forth in the said order of council, to *Henry Siffkin*, and did thereby permit a vessel, bearing any flag except the *French*, to proceed in ballast from any port north of the *Scheldt* to *Archangel*, or any other port in the *White Sea*, there to load a cargo of such goods as were permitted by law to be imported, (except *German* linens, stock-fish, and oil,) and to proceed with the same to a port of the United Kingdom: the master to be permitted to receive his freight, and depart with his crew and vessel to any port not blockaded, notwithstanding all the documents which should accompany the ship and cargo might represent the same to be destined to any neutral or hostile port, and to whomsoever such property might appear to belong; provided that the name of

the

vessel, her tonnage, and the time of her clearance from her port of lading, should be indorsed on that licence. The order in council, of the same date with the licence, upon the authority of the proof it issued, purported to be made "upon reading the petition of *Henry Siffkin*," and was expressed in the same terms as the licence. The following indorsement appeared upon the licence. "The vessel, for which the within licence has been granted, is the *Rostock* ship, called *America*, *A. Gunter* master, 400 tons burthen, which cleared the port of *Archangel* for the port of *London* on the 5th *September*, old style, 1810. The cargo consists in 187 casks of tallow," &c. The captain of the vessel, being cross-examined, admitted that he got his clearance from *Archangel* on the 20th of *September* new style; he received his orders on that day: the vessel sailed from *Archangel* on the 22d of *September* new style, and was lost in her return to *Archangel* to it, while she was coming in over the bar of the harbour. The goods insured were the property of *Brandt, Rodde*, and Company, of *Riga*, *Russian* subjects, there being at the time of the clearance and adventure war between *England* and *Russia*. The first objection made upon these facts was, that the condition of the licence had not been complied with, inasmuch as the true time of the ship's clearance from her port of loading was not indorsed on the licence; and that therefore the adventure was illegal: the second objection was, that the persons interested were alien enemies, the importation of whose property was not authorized by that licence. The jury, however, under the direction of *Mansfield*, C. J., found a verdict for the plaintiff, for total loss, with a small benefit of salvage: and *Best* obtained a *le nisi* for a new trial upon the two points last mentioned, and so upon the question whether the jury ought not to have found average loss only: but this last point was not mentioned on the discussion of the rule.

*Shepherd* and *Lens*, Serjts. in *Michaelmas* term 1812, shewed cause against this rule. They contended that the condition of the licence was sufficiently complied with. The process of obtaining a clearance was a work of several days; the clearance consisted not in any one particular paper, but in the whole number of papers requisite to enable the ship legally to prosecute her voyage; a seaman applied at the custom-house for his papers one day, and received them on another. Probably the indorsement on this licence was made there on the day on which the captain first applied for them. [The Court suggested, that

1811.

MORGAN.

v.  
OSWALD.

[ 556 ]

as



1811.  
 —  
 MORGAN  
 v.  
 OSWALD.

[ 557 ]

as this adventure was contraband in *Russia*, it could not be presumed that the indorsement was made by the officers of the customs at *Archangel*. It certainly was the practice in *England* for the captains of vessels to procure similar indorsements to be made at the custom-house, although no law required them to be there made.] It was often the practice of the merchant who was the owner of the vessel or cargo, and resident perhaps at a considerable distance from the place where the ship lay, to procure the clearance; in such a case, a literal compliance with the condition of the licence would be impossible; in the present case it was substantially complied with, which was all that was necessary. *Edwards's Leading Decisions in Cases of British Licences*, 24. *Vrow Cornelia*. *Scott, J.* says: "In the use and application of licences, the Court will not confine the parties to a literal construction. It is sufficient that they shew, under the difficulties of commerce, that they come as near as they can to the terms of the licence; and where that is done, the Court will not prevent them from having the entire benefit intended by his majesty's government." In the cases of *Robinson v. Cheeswright*, and *Same v. Turay*, now pending in the King's Bench on the same ship and policy, that Court appeared disposed to consider the clearance as a continued act, the collection of all the papers that are necessary to enable a ship to sail, so that the time of applying for or obtaining any one of those papers may properly enough be called the time of the ship's clearing. On the second point, they contended, that the language of this licence was the most comprehensive that could be used. It did not require that the ship or cargo should be the property of *Siffkin*, to whom the licence was granted, as in *Feise v. Thompson*, ante, 1. 121., and *Feise v. Waters*, ante, 2. 248., or the bearers of his bills of lading, as in *Defflis v. Parry*, 3 *Box & Pull*. 3.; nor did they require, as many licences expressed it, that it should be the property of *Siffkin* or other *British* merchant, as in some other cases, nor that it should be the property of *Siffkin* or others, as in the cases of *Flindt v. Scott*, 15 *East*, 524., and *Flindt v. Larkin* (a). Nor was it a licence for *Siffkin* to import: it was a licence to *Siffkin* for a ship to import. It did not define to whom, or to what country the vessel should belong; it was expressly permitted that the ship might bear any flag except the *French*; and the licence was to

[ 558 ]

(a) Since reported in *B. R.*, 1 *Maucl & Selw.* 217. 220.

be effectual, to whomsoever the property in the goods might appear to belong, which meant, to whomsoever they actually might belong. This construction was fortified by considering the purpose of these licences, which was to sanction and facilitate the importation of the species of goods of which this country stood most in need, not further regarding who might be the owners, or who might derive the profits of the adventure, than by placing it under the guardianship of the person whom the government considered worthy to be entrusted with the management of this licence. The courts of admiralty have uniformly put this construction upon the words "to whomsoever such property might appear to belong." In the case of the *Cousine Marianne*, *Edwards's Leading Decisions in Cases of British Licences*, 20., *Scott, J.* says: "this Court has never yet restored the property of an enemy, except in those instances where the words 'to whomsoever the property may appear to belong,' are introduced into the licence. Where those words occur, they have been held to exclude all inquiry into the proprietary interest." The same was held by *Grant, M. R.* in the case of the ship *Hendrick*, 1 *Atton*, 329. In the case of the *Vrouw Cornelia*, *ibid.* 23., though the facts are not similar, yet the decision of *Scott, J.* abundantly establishes the position, that licences are to receive the most liberal construction. *Usparicha v. Noble*, 13 *East*, 352, recognized the principle that a licence authorizing a trade to the port of an alien enemy, intends that alien enemies resident there must have interest in the goods consigned thither, and therefore impliedly authorizes such consignees to insure the adventure licensed, and to enforce the contract of insurance by suit in our courts. Upon the same principle, this licence intends that the goods to be exported from *Archangel* will be the goods of alien enemies resident there, and it also impliedly authorizes them to effect here insurances on their property, and to enforce their contract in this country, as a part of the necessary rights and protection incident to the enjoyment of that commerce which it is the purpose of these licences to permit and encourage. If this were a licence, the only object whereof was the furtherance of our own export trade, there might be more reason for restrictions upon the homeward cargo; but the object of this licence is evidently the homeward cargo only, for the ship is to go to *Archangel* in ballast. It does not prescribe whether the homeward cargo shall be *English* or *Russian* property: it may possibly be *English*, but it is more probable it should be *Russian*, and if it

1811.

MORGAN  
v.  
OSWALD.

[ 559 ]

1811  
 ———  
 MORGAN  
 v.  
 OSWALD.

it be, the country obtains this additional benefit, that the goods, of which she stands in need, are consigned hither at the risk of *Russian* subjects, and by the employment of *Russian* capital in our service. If it restricted the goods of the sorts required to such as were *English* property only, it is most probable that no such cargoes could be procured.

[ 560 ]

*Best* and *Marshall*, Serjts., in support of the rule, contended, as to the first point, that the words requiring the date of the clearance to be indorsed, most rigidly and technically constituted a condition; there might be good reason for the government to wish to know the exact moment of a ship's quitting an enemy's country; the reason, however, it was unnecessary to inquire, since, if it were a condition, however immaterial might be the cause for which it was introduced, it must be rigidly complied with. The reason why a warranty in a policy must be literally performed, is because it is a condition. By Lord *Mansfield*, C. J., *Dehahn v. Hartley*, 1 *T. R.* 345. This condition must, above all others, be most exactly performed, because it is a condition in a grant of the crown, made in favour of the crown, which is to be construed more strictly than a condition in favor of a subject. This Court would hesitate before it would pursue the decisions of the Court of Admiralty, which avowedly varied a little, according to circumstances of political expediency; but the Courts of common law could not be guided in their decisions by motives of political expediency. Had the condition then been performed? If the captain understood what a clearance was, according to his testimony it had not, for the licence was indorsed as if the clearance had been obtained on the 17th of *September*, new style, and the clearance was not in fact obtained till the 20th; if the clearance was not indeed any one single document, but the perfecting of all the documents requisite for the ship's sailing, the time of obtaining the last of them was the date of the clearance; and either way, the condition had not been performed. The facts upon which Lord *Ellenborough* directed the jury in the cases of *Robinson v. Cheesewright*, and *Robinson v. Tcuray*, are not before this Court, therefore no application can be made of those cases to the present question. As to the second point, this is the form of licence which would be granted in order to dispense with the disabilities of trade with *Russia* which a state of war imposes, and to enable a *British* subject to import foreign property in a *British* vessel. But to give it the effect contended for, will be giving the licence a much

much wider scope than the mere dispensing with the disabilities of war; it will be also dispensing with the provisions of all the navigation acts, for this is a *Rostock* vessel, in which the goods are imported. This indeed his majesty in council is enabled to do by order in council or licence, under the statute 45 G. 3. c. 40., whether in a friendly or a hostile vessel; but considering the great benefit which this country has derived from the navigation acts, policy requires that any grant made in derogation of those acts shall receive a very strict construction. This licence issues on the petition of *Siffkin*; it is granted to *Siffkin*; it therefore necessarily means that *Siffkin* shall import. If it had been to *Siffkin* and others, that would only have protected others *ejusdem generis*, other *British* subjects, who stood in the same relation to the *British* government, as the Court of King's Bench have determined in the cases of *Flindt v. Scott*, 15 East, 524., and *Flindt v. Crockatt*, *ibid.* 522., and *Flindt v. Larkin*, tried 4th March 1812 (a). This permission is still more confined: it is to *Siffkin* only. It must be intended that the vessel permitted to depart is the vessel of *Siffkin*, and of none other. No words in the licence shew an intention that the privileges conferred by this grant are to be imparted to any other person, much less to alien enemies, or that the goods to be imported should be an enemy's goods. It is a rule in the construction of royal grants, that the king is not bound, unless it appears that all the circumstances are disclosed to him: nor is it to be gathered from the order in council on which the licence was founded, that the king knew the goods were to be the property of alien enemies. It is therefore sought to make of the grant of the crown a use which the crown never contemplated. *Jonge Johannes*, 4 Rob. 264., *Scott*, J. held that "a material object of the controul which government exercises over such a trade is, that it may judge of the particular persons who are fit to be entrusted with an exemption from the ordinary restrictions of a state of war." The crown totally fails of this object if the privileges of the licence may be communicated without its knowledge. *Hoffming*, 2 Rob. 162., *Scott*, J. said, "it is indubitable that the king may, if he pleases, give an enemy liberty to import: but I apprehend that unless there are very express words to this effect to be found in the licence, I am to consider its meaning as not going to that extent, but as giving

1811.

MORGAN  
v.  
OSWALD.

[ 561 ]

[ 562 ]

(a) Not yet reported.

1811.

MORGAN  
v.  
OSWALD.

such a liberty only to subjects of this country: it is a licence to *British subjects* to import, and as I understand it, they are to import *on their own account*; and if it appeared that the importation was on the account of other than *British* merchants, I should hold, that under the terms of the licence it could not be considered as a legal importation." [Gibbs, J., Sir William Scott lays down this principle: ~~that~~ while the trade of the country remained in its original state, and the licensed trade was the exception to the general rule, licences were to be construed strictly, but that since the licensed trade has become the general trade, and the unlicensed trade the exception, licences are to be construed liberally.] With the most unfeigned submission to so great a name, that doctrine can never be received in the courts of common law; it will not be endured here that the interpretation now to be put on a written instrument shall be the reverse of the interpretation which was put on the same instrument ten years since, because the instrument is of more frequent recurrence; it would disturb all the rules for the construction of contracts. In the case of the *Jonge Klassina*, 5 Rob. 297., where Mr. *Ravie* of Birmingham had obtained a licence for the importation of certain goods from *Holland* to this country, being his property; Scott, J. held it not to protect goods shipped at the risk of *Ravie* from *Amsterdam*, where he had another house of trade, and the shipping of which goods, *Ravie*, being in *Holland*, personally superintended, *a fortiori* such a privilege is not to be transferred to an alien enemy. The authority of the earlier decisions of that great Judge, backed with the uniform course of the common law, must therefore be opposed to his latter decisions; and it is better that the judgments of this Court should militate with the judgments of the Court of Admiralty, than be discordant to the former determinations of themselves and of all the other common law courts. It is not competent for this Court to enter into reasons of state policy, or to conjecture what was the intention of the privy council, or to collect it from the framers of the instrument, or from any other source than the language of the licence. The true meaning of the words "to whomsoever the goods may appear to belong," is not, as has been suggested, to whomsoever they shall belong: for it is a rule of construction that no word is to be rejected as useless when it may bear a meaning, but that construction would make the word "appear" wholly insignificant. A further

[ 563 ]

ther reason results from the rule "*noscitur a sociis*;" the words are found in the same sentence with the permission to use a fictitious flag, a false destination, and simulated papers, they relate to appearances assumed for the purpose of eluding an enemy, not to the true ownership. It does not appear in the case of *Usparicha v. Noble*, what were the terms of the licence. Lord *Ellenborough*, C. J., however, said upon occasion of the case of *Mennet v. Bonham*, 15 *East*, 477., that if that case were to be pressed upon the Court of King's Bench, they had rather get rid of the authority of *Usparicha v. Noble* than of *Conway v. Gray*, 10 *East*, 536. That Court sent down the cases of *Hagedorn v. Bassett*, and *Hagedorn v. Vaughan (a)* to a second jury, in order to try whether *Hamburgers* were alien enemies: but the licence, which was similar to this, would have rendered that fact wholly immaterial, if the words "to whomsoever the property may appear to belong," which the plaintiff's licence contained, would have covered the hostile property. It was observed that the ship licensed was to go in ballast, but that is not to go from this country, only from some port north of the *Scheldt*, that she may not carry on trade between those ports and *Russia*; and this provision is perfectly consistent with her first carrying out a cargo of *British* or colonial produce from *England*; therefore that inference fails. It is truer policy to give employment to *English* than to *Russian* capital in the supply of our national wants; and the profits of the trade more than countervail the risk. This too is a very dangerous power, and may be much abused. But the question of policy is not for this Court to consider.

They prayed that the Court, if inclined to give judgment for the plaintiff, would permit the case to be turned into a special verdict.

GIBBS, J. observed that all these licences differed so much in their terms, that unless the very words of the licence granted in each case were before the Court, there was no mode of seeing how far the case cited was applicable to the subject of discussion. The licence in *Usparicha v. Noble* was granted in very early times.

*Cur. adv. vult.*

On this day *Mansfield*, C. J. delivered the opinion of the Court.

(a) Not yet reported.

1811.

MORGAN  
v.  
OSWALD.

[ 564 ]

1811.

MORGAN  
v.  
OSWALD.

[ 565 ]

This cause has been argued much at large. It is an action on a policy of assurance, and the principal objection to the policy in this case is founded, not on any facts relating to the circumstances of the voyage, but on the ground that the persons seeking to recover in this action were not persons authorized by this licence to import the goods which were insured; there was also another previous objection, that supposing the licence to be effectual, the adventure did not come within the condition of the licence. I will take notice of this objection first, because the same thing has been decided in the Court of King's Bench (a). The licence which permits the ships to proceed, has a proviso, that the name of the vessel, her tonnage, and the time of her clearance from her port of loading, shall be indorsed on this licence. An indorsement was made upon the licence, and it is thus indorsed: "The vessel for which this licence is granted is the *Rostock* ship called *America*, Gunter master, which cleared the port of *Archangel* for the port of *London* the 5th *September* 1810." That 5th *September* 1810, old style, is the 17th *September* new style. The captain's evidence was, that he got his papers on the 20th of *September* new style, and sailed on the 22d; and it is objected, that the indorsement does not specify the true date of the clearance. We think, as the Court of King's Bench did, that there is no foundation for this objection, but that the proviso has been sufficiently complied with. In the first place, we do not know what a clearance is; we thought at first, as many other persons did, that it was some particular document or memorandum; but it now appears, that there is no such thing as any one particular paper called a clearance: if there be no such thing, then it is impossible to comply with the literal terms of the proviso. If it had been a single document, and had been prepared at the *English* custom-house on the 17th of *September*, it is very possible that the captain could not, and might not have received it till the 20th; so that even in the case of a vessel sailing from *England*, acts of the officers of government might have prevented a more literal compliance with this condition than has here been practised. But if the defendant meant to rely on this objection, it was incumbent on him to make out, by some evidence or other, what a clearance is, and to shew that the indorsement was not true; this, however, he has not

[ 566 ]

(a) The Counsel for the Defendant were not aware of the case here alluded to.

done;

done; and in this obscurity it is impossible for us to say that the truth of the indorsement is inconsistent with the captain obtaining his papers on the 20th. That objection being out of the way, the great objection is, that by the terms of the licence, the goods must be laden by *Siffkin*; and not only that these goods are not laden by *Siffkin*, but that even if other *British* subjects might import under this licence, yet that the plaintiffs could not, because they are the enemies of the country. This question is also before the Court of King's Bench, and it would have been desirable if the Judges of both courts could have met and settled the point; but the term drawing to an end, we think it best to decide as well as we can. The petition is the petition of *Siffkin*, and the effect of the licence is to send a ship, to proceed in ballast for any port of *Russia*, and there to load. A ship sent to *Russia* to take in goods, must necessarily be supposed to take in *Russian* goods, and it must be naturally supposed that those *Russian* goods are the property of *Russian* subjects. If *Siffkin* had imported *Russian* goods, no objection could be made; nor, I suppose, if any *British* subject had: but the question is, whether a *Russian* subject may import such. What, then, is the difference whether a *British* or *Russian* subject imports? If a *British* subject imports the goods, in all probability he must pay for them; and they come hither at his risk: if they are imported, as in this case, by a *Russian*, they are at his risk. The great object of the licence is, to have *Russian* goods in this country, and in all the licence there is not a single hint, by whom they are to be put on board. It therefore seems to follow, that they may be put on board by a *Russian* subject; and if it does, then it necessarily follows, that, according to the case of *Usparicha v. Noble*, all the rights attach which are necessary for the enjoyment of the right of importing; therefore, unless we overturn that case, which has all the principles of sound sense to support it, it necessarily follows, that a *Russian* subject, licensed to import goods into *Great Britain*, has a right to insure them. A great number of objections were made against this construction of the licence; and much argument was used to shew by what rule such licences were to be construed; and it was said, they were to be construed strictly. Lord *Ellenborough*, and the Court of King's Bench, in the case of *Usparicha v. Noble*, and other cases, and certainly the Court of Admiralty also, now are of opinion, that licences ought to be construed liberally, and I think, upon very good

1811.

MORGAN  
v.  
OSWALD.

[ 567 ]



1811.

MORGAN

v.

OSWALD.

[ 568 ]

good ground. This species of licence has been considered as an exception out of the general law, but it is now used to carry on a very great part of the trade of the country; and unless it were so carried on, a very great part of the trade must be lost; and for preserving it, the licences ought to be construed liberally. And though certainly this Court is not bound to follow the authorities in the Court of Admiralty in general, yet as that Court has primary, and even exclusive jurisdiction in several subjects of capture and marine law, from which the Courts of common law have taken all their doctrine relating to these subjects, I think it would be of most mischievous consequence, if hereupon we differed from them. It has been said, that a grant of the king must be strictly taken; but this is the first time that such a licence as this was ever assimilated to a grant of property from the king; a commercial licence is not at all like such a grant. With respect to confining the licence to the persons to whom the licence was granted, I am sure that that objection has been over-ruled in this Court. In some cases indeed, as *Feise v. Thompson*, the licence has been express, to import goods belonging to particular persons, there only the goods which belonged to those persons could be imported; but there are many cases where the licence has been granted for three, four, or five ships, in which no such restriction has prevailed. Much argument has been raised on the words, "to whomsoever they shall appear to belong," and it is said that the Court of Admiralty has decided it to mean "to whomsoever they shall belong;" it is unnecessary for us here to consider whether such is the effect of that provision in the licence or not, though I may again observe, that it is extremely desirable that the construction which this Court should put on it, should agree with the construction put on that part of the licence by the Court of Admiralty, because they have the great original jurisdiction in all questions of this sort. I have mentioned the case of *Usparcha v. Noble*, the parts of it that are material have been so often read that it is unnecessary for me to repeat them; the Court of King's Bench are there of opinion, that a licence legalizing the adventure, gives the means of prosecuting all the rights which arise out of that adventure. I have another case which shews what rights may be acquired by the subjects of states in hostility. *Fenton and Another, Assignees of Rennards, Bankrupts, v. Pearson*, 15 East, 419.; the marginal note is, "A trading licence from the crown to British merchants to send a ship in ballast"

“ballast to an enemy’s port, there to receive and load a cargo,  
 “and import it into this country, by legalizing the purchase by  
 “the subject, legalizes the sale by the enemy, and impliedly  
 “legalizes the vendor enemy’s right to stop the goods *in transitu*  
 “after their arrival in port here, upon the intermediate insol-  
 “vency of the vendees, after a part-payment only, (which was  
 “offered to be refunded,) and also to employ an agent here for  
 “that purpose.” Now, to follow the right of stopping *in*  
*transitu*, it will result, that if the *Russian* consignor had a right  
 to stop the goods, he might bring an action for them, for it  
 would be ridiculous to hold that he had a right to stop *in tran-*  
*situ*, unless he might enforce that right by an action, if im-  
 peded in the exercise thereof. Without going minutely into  
 detail, therefore, it suffices to say, that under this licence, *Rus-*  
*sian* subjects were at liberty to import their goods into this  
 country; and if a *Russian* subject had a right to import those  
 goods, he had therefore a right to insure them, and to bring  
 actions to enforce that contract; the consequence is, that the  
 verdict, which in this case has been found for the plaintiff, must  
 stand, and the

1811.

—  
 MORGAN  
 v.  
 OSWALD.

[ 569 ]

Rule must be discharged.

---

### REGULA GENERALIS.

**I**T IS ORDERED, That from henceforth bail in this Court  
 shall justify at the sitting of the Court only, and at no  
 other time, except on the last day of term, when bail, who may  
 have been prevented from attending at the sitting of the Court,  
 shall be permitted to justify at the rising of the Court.

END OF EASTER TERM.

1. The first part of the document discusses the importance of maintaining accurate records of all transactions and the role of the accounting department in ensuring the integrity of the financial statements. It also highlights the need for regular audits and the importance of transparency in financial reporting.

2. The second part of the document focuses on the implementation of internal controls to prevent fraud and ensure the accuracy of financial data. It outlines the key components of a robust internal control system, including segregation of duties, authorization procedures, and regular monitoring and evaluation.

3. The third part of the document addresses the challenges faced by organizations in managing their financial resources effectively. It discusses the importance of budgeting and forecasting, and the need for flexible financial management strategies to adapt to changing market conditions.

4. The fourth part of the document explores the role of technology in modern accounting and finance. It discusses the benefits of using accounting software and the importance of data security in the digital age. It also touches on the emerging field of blockchain technology and its potential impact on the accounting industry.

5. The fifth part of the document provides a summary of the key points discussed and offers recommendations for organizations looking to improve their financial management practices. It emphasizes the importance of continuous learning and adaptation in the ever-evolving field of accounting and finance.

AN  
INDEX  
TO THE  
PRINCIPAL MATTERS  
CONTAINED IN THIS VOLUME.

---

A

ABATEMENT,

See INFANT, 1.

ABSTRACT OF TITLE,

See AGREEMENT, 8.

ACTION, NOTICE OF,

See NOTICE OF ACTION.

ACTION ON THE CASE.

1. If a vessel is damaged by another running foul of it, and the jury find a verdict for the plaintiff, the Court will not send the case to a new trial because there may be some ground to believe that the plaintiff was negligent in navigating his vessel, as well as the defendant. *Collinson and Others v. Larkins.* 1
2. If a broker, being authorised to sell goods for a certain price, sells them at an inferior price, the proper remedy is by action on the case. *Dufrene v. Hutchinson.* 117

ADMINISTRATION.

1. If an administrator shews that he sues for a greater value than is covered by the *ad valorem* stamp of his letters of administration, he shews his administration to be void, and cannot recover. VOL. III.

*Hunt, Administrator of Campbell, v. Stevens.* 113

2. Although he sues for a double claim. *ib.*
3. He must prove his administration, for that constitutes his title to recover. *ib.*
4. And it will not suffice to sue out new letters of administration on a larger stamp after he has obtained judgment. *ib.*

ADVOWSON,

See PERPETUAL CURACY. RECOVERY, 8.

AFFIDAVIT.

1. An affidavit, the title of which styles the plaintiff "Assignee," without further explanation, is bad. *Steyner v. Cottrell.* 377
2. Any person other than the defendant making an affidavit of merits to set aside an interlocutory judgment, must either swear that he is the defendant's attorney's managing clerk, or the defendant's attorney. *Nessom v. Whytock.* 403
3. An affidavit, having only one stamp, cannot be used in more than one cause. *Anonymous.* 469

AGREEMENT,

And see ILLEGAL CONSIDERATION, 1, 4.  
EVIDENCE, II. 1, 2.

1. If a builder undertakes a work of specified

specified dimensions and materials, and deviates from the specification, he cannot recover upon a *quantum valebant*, for the work, labour, and materials. *Ellis v. Hamlen*. 52

2. Whether an instrument shall be a lease, or only an agreement for a lease, depends on the intention of the parties, as it is to be collected from the instrument. *Morgan, on the Demise of Dowding, v. Bissell*. 65

3. Strong circumstances of inconvenience apparent on the instrument, if it should be construed as a lease, indicate the intention of the parties, that it should be an agreement only. *ib.*

4. Such as a stipulation that out of the rent mentioned, a proportionate abatement should be made in respect of certain excepted premises; for until that was apportioned, the lessor could not distrain. *ib.*

5. And a stipulation that the tenant shall hold at and under all usual covenants as between landlord and tenant where the premises are situate; for it may be disputable what are usual covenants. *ib.*

6. An order for goods written and signed by the seller in a book belonging to the buyer, may be connected with a letter of the seller to his agent, mentioning the name of the buyer, and with a letter of the buyer to the seller, claiming the performance of the order, so as to constitute a complete contract within the statute of frauds. *Allen v. Beprest*. 169

7. It is no objection to the validity of a contract for the sale of goods signed for the seller, that the seller cannot enforce the same contract against the buyer, because the buyer has never signed it. *ib.*

8. An agreement to grant a lease contains no implied engagement for general warranty of the land, nor for delivery of an abstract of the lessor's title. *Gwillim v. Stone*. 433

#### ALIEN ENEMY.

1. Under a licence to *British* brokers resident here, that a ship bearing any flag may import from an enemy's country, to whomsoever the property may

appear to belong, three *British* subjects not named in the licence, one of whom resides in a hostile country, may import from another hostile country to this. *Fayle and Another v. Bourdillon*. 546

2. And the agent who effected the policy, may recover in trust for three *British* partners, one of whom at the time of the action resides in an alien enemy's country. *ib.*

3. A licence to *H. S.* a *British* merchant, that a ship may go to an hostile port, and bring home a cargo of goods, authorizes the importation of such goods, being the property of an alien enemy, subject of that hostile country, and therefore authorizes him to insure, and enforce his contract of insurance in our courts. *Morgan v. Oswald*. 554

#### AMENDMENT.

See BAIL, IV. 3. RECOVERY, 1, 2, 5, 6.

After nonsuit for a variance in an undefended action on a replevin-bond, the Court permitted the record to be amended, and a new trial to be had. *Halhead v. Abrahams*. 81

#### ANNUITY.

1. To entitle the grantee of an annuity to recover back the price, as money had and received, it is sufficient if the grantor has communicated to the grantee that there are defects in the memorial, and has treated for a compromise on the ground of the annuity being void, although the grantee neither demands payment of the arrears nor tenders new securities, nor delivers up the old ones, before he sues. *Waters v. Sir William Mansell, Bart.* 56

2. And although the grantor has taken no active measures to set aside the securities. *ib.*

3. If a correct memorial of an annuity deed be incorrectly inrolled for a time, and after some years the officer of the inrolment office discover and rectify the error before any proceedings had to vacate the annuity, the Court finding the inrolment right when they call for it, will not enquire when the entry was made.

made. *Garrick v. Williams and Others.*

540

4. But it is a high misprision in an officer to alter the inrolment without the sanction of the Court of Chancery.

*ib.*

5. Whether it be sufficient for the grantee of an annuity to carry a memorial to the inrolment office and pay for it, without insisting on himself seeing it inrolled, and comparing the inrolment with the original memorial, *quare. ib.*

### ARBITRATION.

1. An arbitrator to whom the question of the right of two rectors to the tithe of certain lands was referred, had power to devise all means to prevent future litigation between the parties, and to settle all matters in difference between them, and to determine what he should think fit to be done by either of the parties, touching the matters in dispute. Held, that he did not exceed his power, by awarding undivided moieties of the tithes to the two rectors. *Prosser, Clerk, v. Goringe.*

426

2. If arbitrators award an excessive sum to be paid to themselves, the Court will refer it to the prothonotary to reduce it. *Miller v. Robe and Another.*

461

3. It is competent to arbitrators to enquire whether a ransom, for which the plaintiff seeks to be repaid, were justified by an extreme necessity, within the statute 45 G. 3. c. 72. s. 16. *ib.*

### ASSUMPSIT,

See INDEBITATUS ASSUMPSIT, 1. BARON AND FEME, 1. JUDGMENT, 3.

### ATTESTING WITNESS,

See EVIDENCE, II. 1.

### ATTORNEY.

1. An attorney who is a justice of the peace for a borough, if sued by original for an act done in his office as magistrate, may plead his privilege in abatement. *Duffy v. Oakes.*

166

2. Feme covert cannot make an attorney. *Oulds and Others v. Sansom.*

261

### AWARD,

And see REFERENCE.

If an award is lost, the Court will, nevertheless, permit judgment to be entered accordingly, upon affidavit of its contents. *Hill v. Townsend.*

45

### AVERMENT, WHAT MUST BE PROVED,

See EVIDENCE, II. VARIANCE, 1, 2.

## B

### BAIL.

- I. *Of the arrest and the bail.*
- II. *Proceedings against the bail or the sheriff.*
- III. *Surrender of the principal.*
- IV. *Discharge of the bail by other means.*
- V. *Writ of error.*
- VI. *Of bail to criminal process.*

#### I.

A person may assist bail in taking and may lawfully detain the principal, although the bail do not continue present. *Pyewell v. Stow.*

425

#### II.

And see PRACTICE, II. 2.

If a plaintiff recover a judgment for money lent and interest, he cannot therefore require the bail to pay him interest on the amount of the judgment as part of his costs. *Waters v. Rees, one of the Bail of Sir W. Mansell, Bart.*

503

#### IV.

1. If an action be commenced, and the defendant become bankrupt and obtain his certificate, and afterwards permit judgment to be signed for want of a plea, after which the plaintiffs proceed against the bail, the Court will not relieve the bail on motion. *Clarke v. Hoppe and Another, bail of Wilson.*

46

2. And *semble* that they could in no mode take advantage of the bankruptcy and certificate.

*ib.*

E 2

3. If

3. If bail by mistake misname in the recognizance the plaintiff to whom they mean to be bound, the Court will not rectify the recognizance and proceedings in an action thereon after issue joined on *nul tiel record*. *Venn v. Warner*. 263

## V.

*And see PRACTICE, X.*

- A mortgage deed, containing a covenant for the repayment of the money, is within the meaning of the stat. 3 Jac. 1. c. 8., a contract upon which bail in error is necessary. *Buckney, Executrix, v. Metham*. 383

## VI.

- The Court of Common Pleas cannot apply the forfeited penalties of the recognizances of bail to attachments, to the discharge of the debts and costs of the defendant in the original action. *Rex v. Davey*, in the cause of *Hackett v. Mewes and Another*. 113

## BANKRUPT.

- I. *Of the bankruptcy and commission.*  
II. *Of the bankrupt's rights and duties.*  
III. *Of the bankrupt's estate.*

## I.

1. A deed whereby a debtor, being pressed, conveys estates in trust to sell, and to pay the pressing creditor, with a further trust to pay his debts to certain relatives, in order to give them an undue preference in contemplation of bankruptcy, is an act of bankruptcy. *Morgan and Others, Assignees of Hunt, a Bankrupt, v. Horseman and Others*. 241
2. But the deed is valid, so far as relates to the protection of the urgent creditor. *ib.*
3. Whether void for the residue, *quare, ib.*

## II.

*And see BAIL, IV. 1, 2.*

1. A bankrupt, who had brought an action to try the validity of his commission, and obtained a verdict; pending a rule to set it aside, secretly con-

fessed judgment to one of his assignees, who was the petitioning creditor, for a sum of money, in discharge of his debt, and the costs of the action, in consideration of the petitioning creditor's consenting not to oppose the bankrupt's petition for a *supraedeas*. The Court set aside the judgment on the bankrupt's application, on 5 G. 2. c. 30. s. 24. *Thomas v. Rhodes*. 478

2. The statute 5 G. 2. c. 30. s. 24., was made for the protection of bankrupts as well as of creditors. *ib.*

## III.

1. A custom that purchasers of hops from hop-merchants shall leave them in the merchant's warehouse for the purpose of re-sale, upon rent, undistinguished from the merchant's stock, is not such a custom of trade as will prevent the hops from becoming the property of the merchant's assignees, in case of bankruptcy, as being in his possession, order, and disposition. *Thackwaite v. Cock and Others, Assignees of Moore, a Bankrupt*. 487
2. *Semle* that a stocking-frame let on hire to a working hosiery in manufacturing districts is not a chattel within his disposition. *Per Lawrence, J.* 490

## BARON AND FEME,

*And see DEED, 1. ATTORNEY, 2.*

- No ill treatment by the husband of the wife, short of personal violence, or such as to induce a reasonable fear of it, will enable a stranger to maintain *assumpsit* against her husband for necessities furnished to her subsequently to her leaving his house. *Horwood v. Heffer*. 431

## BILL OF EXCHANGE.

1. The defendant being unable to pay a bill when due, which he had accepted, obtained time, and indorsed to the plaintiff, as a security, a bill drawn by himself to his own order, which, when due, was dishonored by the drawee, but the holder omitted to give the defendant notice: held that by this laches the defendant was not only discharged as indorser of the one bill, but also as acceptor of the other. *Bridges v. Berry*. 130

2. A

A bill of exchange, part of the consideration for which is spirituous liquors sold in less quantities than of 20s. value, is totally void, though part of the consideration was money lent. *Scott v. Gillmore.* 226

3. If a bill be accepted, payable at a banker's, it must be presented there for payment, and the neglect so to present it is equally a discharge to the acceptor, as to the drawer. *Callaghan v. Aylett.* 397

4. An averment that a bill accepted payable at a banker's, was, when due, presented to the banker's for payment, according to the tenor and effect of the bill, and of the acceptor's acceptance thereof, and that as well the bankers as the acceptor refused payment, shall be supported after judgment on a sham plea. *Hussam and Another v. Ellis.* 415

5. And it shall be intended that the bill was presented for payment to the acceptor himself at the house of those persons. *Semb.* *ib.*

6. For evidence of those facts would be admissible under such an allegation, and not repugnant to it. *ib.*

#### BILL OF LADING,

See EVIDENCE, II. 8, 9.

1. A bill of lading, signed by a master of a vessel, since deceased, for goods to be delivered to a consignee or his assigns, he paying freight, is admissible as evidence of the consignee having an insurable interest in the goods. *Per Lawrence, J. Haddow v. Parry.* 303
2. But if the master guards his acknowledgment by saying, "contents unknown," so that he does not charge himself with the receipt of any goods in particular, the bill of lading alone is not evidence, either of the quantity of the goods, or of property in the consignee. *ib.*
3. A bill of lading may operate as a contract between the master and consignee for payment of demurrage as well as of freight. *Leer v. Yates.* 387

#### BROKER.

1. A broker purchases goods on commission at a month's credit, and pays du-

ties on them, and sends them to the purchaser's place of abode, consigned to his own order: the seller being fearful of the purchaser's credit, procures the broker to delay the arrival of the goods till the month's credit is expired, and to tender them to the buyer on payment of the price, whereupon they are refused. Held that the broker can neither recover the price, duties, or commission, in an action for money paid. *Hurst v. Holding.* 33

2. If a broker being authorized to sell goods for a certain price, sells them at an inferior price, he is not liable in trover for amount of the goods. *Dufrene v. Hutchinson.* 117

3. The proper remedy is by an action upon the case. *ib.*

4. A broker charters ships, at a commission of 2½ per cent. on their outward freight, and the like on their homeward freight, if the charter-party makes it contingent what the amount of freight shall be, the broker cannot sue for any sum till the contingency is determined. *Winter v. Mair.* 531

#### C

#### CARRIER.

1. If a carrier gives notice that he will not be accountable for goods above the value of 20l. unless entered and an insurance paid, over and above the price charged for carriage, according to their value, a person who enters silk exceeding the value of 20l., and does not pay the insurance, cannot recover any part of the value of the goods, if lost. *Harris v. Packwood and Another.* 264
2. Although the price he agrees to pay for the carriage of the silk, is, on account of its superior value, higher than the ordinary price charged for the carriage even of bulky articles. *ib.*
3. And although the carrier does not prove that the loss happened by any of those accidents against which the law makes him an insurer. *ib.*
4. The carrier is not bound to prove that he used reasonable care. *ib.*
5. *Semb.* A carrier is entitled to make a higher



higher charge for the superior risk attending the carriage of valuable goods, but the charge must be reasonable. 264

CASES—observed upon, doubted, or explained.

*Falkney v. Reynous and Richardson*, 4 Burr. 2069. 11, 12

*Jones v. Lord Saye and Sele*, 8 Vin. 262.

1 Eq. Cas. Abr. 383. 3 Bro. P. C. 458. 326

*Lacaussade v. White*, 7 T. R. 535. 284

*Moss v. Charnock*, 2 East, 392. 208

*Petrie v. Hannay*, 3 T. R. 418. 11, 12

*Walker v. Chapman and Walter*. Loft. cited Doug. 454. 283

### CHANCERY,

And see OFFICER.

Upon a case directed out of Chancery, the Court will not solve any questions that are not expressly put in the case, *Morgan v. Horseman*. 241

### CLEARANCE.

1. If the defence upon a policy be, that the licence requires the date of the ship's clearance from an hostile port to be indorsed thereon, and that it is not truly indorsed, it is incumbent on the defendant to prove what a clearance is, and the discrepancy between the real date of the clearance, and the date indorsed. *Morgan v. Oswald*. 554

2. If the date be indorsed as the 17th, and the real date of the clearance be the 20th, *semble* that it is a substantial compliance with the condition. *ib.*

*Quare*. Whether a clearance be any single document, or the collection of all the papers necessary to enable a ship to sail? *ib.*

### CONTINGENCY.

Where a contract makes the amount of compensation for labour variable, depending on contingencies, the contingency must happen before any sum whatever can be recovered. *Winter v. Mair*. 531

### CONVOY.

1. A ship cannot legally proceed without

convoy from port to port to join convoy, unless a bond has been given that she shall not sail without convoy. *Hinckley v. Walton*. 151

2. A ship licensed to sail without convoy provided she is armed with a certain force, must take that force on board before she breaks ground. *ib.*

3. A ship licensed to sail without convoy with a certain force, and clearing out without giving bond to sail with convoy, and without having the force required, cannot legally go round from her port of clearance to a port of convoy. *ib.*

### COSTS.

I. When payable by and to persons in general.

II. When payable by and to particular persons.

III. Of staying proceedings till costs paid, or security given.

#### I.

1. If two opposite parties require a witness to attend, and he receives payment from both of them, although the payment made by the successful party is afterwards repaid him by the loser, in the taxed costs, the loser cannot recover back the amount from the witness in an action for money had and received. *Crompton v. Hutton*. 230

2. If the plaintiff recover a verdict for a loss on a policy, and endeavour, on a rule nisi being obtained for a non-suit, to support his verdict to the extent, although he be held entitled to a return of premium, he is not entitled to the costs of the rule; nor to any costs, except of the count for money had and received, and of such parts of the brief and evidence as apply thereto. *Spitta v. Woodman*. 406

#### III.

After a defendant has undertaken to accept short notice of trial, he cannot compel a plaintiff, resident abroad, to give security for costs. *Muller v. Germon*. 272

*S. P. Steel v. Lacy*. 273

### COVENANT.

COVENANT.

1. An action on the covenant for quiet enjoyment may be maintained for the disturbance of a way of necessity. *Morris v. Edgington*. 24
2. By indenture tripartite between A. 1. B. 2. C. 3. A., tenant for life, demised to C., and C. covenanted with B. (a receiver) and other the receiver or receivers for the time being, and to and with such other person, who, for the time being, should be entitled to the freehold, and to and with every of them. A. died: held that his executrix could not maintain covenant for breach in her testator's lifetime, but that the action was joint, and survived to B. *Southcote, Executrix of Southcote v. Hoare*. 87
3. A covenant with two and every of them is joint, though the two are several parties to the deed. *ib.*
4. Reservation of 5*l.* per acre during the last 20 years of a term for every acre of meadow thereby demised which the tenant should plough, dig, ear, break up, or convert into tillage during the said last 20 years of the term, and so after that rate for any greater or less quantity than an acre, or less time than a year. The rent is due in the last 20 years if the land is then ploughed, whether it was first ploughed within the last 20 years or before; and the rent continues payable during the 20 years, though the land be again laid down to permanent grass. *Birch and Others v. Stephenson and Others*. 469
5. Land sown to clovers with corn is not thereby restored to a state of permanent pasture, but is still in tillage. *ib.*
6. If a lease describe demised lands as meadow land, no other evidence is necessary to prove that they were meadow land, at the commencement of the term. *ib.*

CROSS-ACTIONS,

*See SET-OFF, 2.*

CURACY,

*See PERPETUAL CURACY.*

D

DEED,

*See POWER, 1.*

A lady having actually married with the consent of guardians named by her deceased supposed putative father, and confirmed by the Court of Chancery, she suffered a recovery; and declared the uses to the joint appointment of herself and her husband, with remainder in strict settlement. It being discovered that her supposed marriage was void, because at the time thereof her legal father was alive, and did not consent to the marriage, the parties conceived that the settlement and recovery were void, and executed a deed of revocation, and suffered another recovery, after which the lady made a new settlement. Held that the recovery and first settlement were valid, although made under a mistake of the situation in which the parties stood. *Boughton v. Sandilands*. 342

DEFEAZANCE,

*See WARRANT OF ATTORNEY, 2, 3.*

DEMAND, *where necessary,*

*See FORFEITURE, 4.*

DEMURRAGE.

A general ship took brandies on board, under bills of lading, which allowed 20 lay days for delivery of the goods in London, and stipulated for 4*l.* per day demurrage. Afterwards certain of the consignees chusing to have their goods bonded, the vessel could not make her delivery at the London docks until 46 days after the 20 days: some of the goods, which were undermost, could not, though demanded, be taken out till the upper tiers were cleared. Held that each of those consignees was liable, on a general count for demurrage, to pay the 4*l.* per day for the 46 days. *Leer v. Yates, Cowell, and Gors.* 587

DEVISE.

## DEVISE.

I. By what words lands, &c. shall pass.

II. What estate.

## I.

1. Where there is an estate sufficient to satisfy a devise according to one meaning of the description of the premises, collateral evidence is not admissible to shew that the testator meant to use the description in a more extensive sense. *Doe ex dem. Chichester, Bart. v. Orenden.* 147
2. Devise of "my estate of Ashton," the testator having a maternal estate comprehending a manor and capital farm, and lands, in the parish of Ashton, as well as several other estates, some in the adjacent parishes, some 10 and 15 miles distant; evidence is not admissible to shew that he was accustomed to call all his maternal estate, his Ashton estate, to raise the inference that he meant to devise the whole by that name. *ib.*

## DISTRESS.

If goods remain on demised premises after a fictitious bill of sale made of them under an execution, they are liable to be distrained as before. *Smith v. Russell.* 400

## E

## EASEMENT,

See EVIDENCE II. 3, 4, 5.

1. No way, or other easement, can subsist in land of which there is an unity of possession. *Morris v. Edginton.* 24
2. But if a lessor, having used convenient ways over his own adjoining land during his own occupation, demises premises with all ways appurtenant, unless it be shewn in evidence that there was some way appurtenant *in alieno solo*, to satisfy the words of the grant, it shall be intended that he meant the ways

used, and they shall pass, though he miscall them appurtenant. *Per Mansfield, C. J.* 24

3. An action on the covenant for quiet enjoyment may be maintained for the disturbance of a way of necessity. *Per Mansfield, C. J.* *ib.*
4. Whether a way of necessity shall be the way most convenient to the lessee? *Semb. acc. per Mansfield, C. J.* *ib.*
5. A lease demised a messuage, consisting of two parts, separated by intervening reserved land, subjected only to a specific right of way for the lessee to a third building for a specific purpose, which reservation, strictly interpreted, would preclude him from all access to the one part, which was accessible only by crossing the reserved lands in one of two directions, the one by entering it from the residue of the demised premises; the other, and far the more convenient, by entering it from a public street: Held that the lessee was entitled to a way across the reserved land from the public street in that part. *ib.*
6. No one can claim a prescription in his own land. *Cooper v. Barber.* 99

## EJECTMENT.

1. If four joint tenants jointly demise from year to year, such of them as give notice to quit may recover their several moieties in ejectment on their several demises. *Doe, on Demise of Whayman v. Chaplin.* 120
2. The Court will not set aside a judgment and execution in ejectment in order to let in a person to defend, though he made an affidavit setting forth a clear title, and offer to pay costs. *Doe ex dem. Ledger v. Roe.* 506

## ESTATE,

See POWER, 1.

## EVIDENCE.

- I. Of the competency of witnesses.
- II. Of the evidence of particular facts or averments.
- III. Of stamps.

And

II.

And see AGREEMENT, 6. VARIANCE, 1, 2.

1. If a defendant calls on a plaintiff to produce at the trial a deed in his custody to which the plaintiff is a party, and under which he claims a beneficial estate, it is not necessary that the defendant should call the attesting witness to prove the due execution of the deed when produced. *Pearce v. Hooper and Others.* 60
2. Antient grants are not to be received in evidence, unless they can be accounted for; as coming from the hands of some one connected with the estate to which they relate. *Swimerton v. Marquis of Stafford.* 91
3. If an act immemorially done in the land of *A.* at each repetition produces an effect on the land of *B.*, which under the ordinary state and disposition of *B.*'s land occasions no perceptible injury, there is no ground to presume a grant from the ancestors of *B.* to the ancestors of *A.* of the right of doing that act. Therefore if *B.* makes a new application and disposition of his land, of such a sort that the effect produced in the land of *B.* by the repetition of the act done in the land of *A.* becomes injurious to the property of *B.*, under such new disposition of his land, *A.* is not authorized in repeating that act. *Cooper v. Barber.* 99
4. But if the effect produced on the land of *B.*, by the act done in the land of *A.*, had at all times occasioned a perceptible injury to *B.*'s property, there would have been a sufficient ground to presume a grant from the ancestors of *B.* to the ancestors of *A.* of the right to do such act. *ib.*
5. *A.* has immemorially had for watering his lands, a channel through his own field, in a porous soil, through the banks of which channel, when filled, the water percolates and thence passes through the contiguous soil of *B.* below the surface, without producing visible injury. *B.* builds a new house in his land, below the level of his soil, in the current of the percolating water: *semble*, that *A.* can-

not now justify filling his channel, if the percolating water thereby injures the house of *B.* *Per Lawrence, J.* 99

6. The certificate of a *British* vice-consul at the *Brazils*, of the amount of the proceeds of damaged goods, which by the law of that country are compellable to be sold under his inspection, is not evidence. *Waldron v. Coombe.* 163
7. What a dead witness has sworn on a former trial between the same parties is evidence in the cause, and may either be read from the Judge's notes, or proved upon oath by the notes or recollection of any person who heard it. *Mayor of Doncaster v. Day.* 263
8. A bill of lading signed by a master of a vessel, since deceased, for goods to be delivered to a consignee or his assigns, he paying freight, is admissible as evidence of the consignee having an insurable interest in the goods. *Per Lawrence, J. Haddow v. Parry.* 303
9. But if the master guards his acknowledgment by saying, "contents unknown," so that he does not charge himself with the receipt of any goods in particular, the bill of lading alone is not evidence, either of the quantity of the goods, or of property in the consignee. *Haddow v. Parry.* *ib.*
10. If a lease describe the demised land as meadow land, no other evidence is necessary to prove that it was meadow land at the commencement of the term. *Birch v. Stephenson.* 469

III.

1. If a lease in writing contain a contract for the purchase of goods, it cannot be given in evidence to prove the sale of the goods, unless it has a lease stamp. *Corder v. Drakeford.* 383
2. Although it had an agreement stamp. *ib.*

EXECUTION.

1. The plaintiff having purchased a public house, for which he could not himself obtain a licence, because he resided

sided in another tavern, put *B.*, an insolvent person, into the house as his servant, to keep it for him, and supplied him with money to pay for the licence, which was granted to *B.* Held that the sheriff was not entitled to take, under an execution against *B.*, the plaintiff's liquors and chattels in the house, committed to *B.*'s custody. *Dawson v. Wood and Others.*

256

2. *Semble*, that a sheriff is not bound to find out what rent is due to a landlord, and pay it him, under 8 *Ann. c. 14.*, unless the landlord gives him notice. *Smith v. Russel.*

400

## F

### FELONY, SUSPICION OF.

Watchmen and beadles have authority at common law to arrest and detain in prison for examination persons walking in the streets at night, whom there is reasonable ground to suspect of felony, although there is no proof of a felony having been committed. *Lawrence v. Hedger.*

14

### FEME COVERT,

See ATTORNEY, 2. DEED, 1.

### FENCES.

1. If a person has a field fenced with a bank and ditch, it is not a necessary consequence that his ditch extends to the width of eight feet from the interior line of the foot of the bank, *i. e.* four for the base of the bank, and four feet for the ditch. *Vowles v. Miller.*
2. Proof of the ancient width of the ditch is evidence that the owner's land did not extend beyond the outer edge thereof. *ib.*
3. And he has no right to cut away his neighbour's land for the purpose of widening the ditch. *ib.*

137

### FINE.

1. All fines acknowledged in *Westminster*

must be acknowledged before a judge or serjeant, if there is a judge in town. *Nokes, Plaintiff; Styles, Widow, Defendant.*

49

2. And if it be acknowledged before any other commissioners, it is irregular, whether it appear by the caption that it was acknowledged in *Westminster* or not. *ib.*

### FLAG OFFICER.

1. The flag officers of a fleet have no right to any share in the gratuity of one half *per cent.*, which is given to the captains of ships of war for carrying public treasure on board their ships. *Montagu v. Janverin.*
2. Nor in the freight received by captains for carrying the treasure of individuals. *Semble.*

442

*ib.*

### FORFEITURE.

1. If a lessee exercise a trade on the demised premises by which his lease is forfeited, the landlord does not, by merely lying by, and witnessing the act for six years, waive the forfeiture. *Doe ex dem. Sheppard v. Allen.*
2. Some positive act of waiver, as receipt of rent, is necessary. *ib.*
3. But if he permits the tenant to expend money in improvements, *semble* that that is evidence to be left to a jury, of his consent to the alteration of the premises. *Per Mansfield, C. J.*
4. If a lessee covenant that if the rent be in arrear for 28 days, the lessor may re-enter, whether a demand of rent be first necessary, *quære.* *Smith v. Spooner.*

78

*ib.**ib.*

246

### FRAUDULENT CONVEYANCES,

See BANKRUPT, 1. 1, 2. EXECUTION, 1.

### FREIGHT,

See LICENCE TO TRADE, 1.

### FREIGHT OF BULLION,

See FLAG OFFICER, 1. 2.

### GOODS

G

GOODS SOLD AND DELIVERED,

See INTEREST OF MONEY, 3. 4. AGREEMENT, 6, 7. INDEBITATUS ASSUMPSIT, 1.

1. Whether a delivery of household goods was complete, the upholsterer still having a servant in the vendee's house, where the goods were, and the vendee not having yet taken any actual possession, *quære*. *Hunt, Administrator of Campbell, v. Stevens and Another.* 113
2. An order for goods, written and signed by the seller in a book of the buyer's, but not naming the buyer, may be connected with a letter of the seller to his agent mentioning the name of the buyer, and with a letter of the buyer to the seller, claiming the performance of the order, to constitute a complete contract within the statute of frauds. *Allen v. Bennet.* 169
3. It is no objection to the validity of a contract for the sale of goods signed by the seller, that the seller cannot enforce the same contract against the buyer, because the buyer has never signed it. *ib.*

GOODS AND CHATTELS, PROPERTY IN,

See EXECUTION, 1.

GRANT,

See EVIDENCE, II. 3, 4, 5.

I

ILLEGAL CONSIDERATION.

1. The plaintiff and defendant being taken prisoners in Portugal, jointly solicited and obtained the liberation of themselves and the ransom of the defendant's ship, contrary to 45 G. 3. c. 72., to effect which the plaintiff lent money to the defendant, who afterwards gave him a bill for the amount. Held, that the plaintiff could not recover on the bill. *Webb v. Brooke.* 6
2. A bill of exchange, part of the consi-

deration for which is spirituous liquor sold in less quantities than of 20s. value, is totally void, though part of the consideration is money lent. *Scot v. Gilmore.* 326

3. The statute 24 G. 2. c. 40. s. 12., making illegal the sale of spirits in less quantities than to 20s. value, unless paid for, extends to spirits mixed with water. *ib.*
4. Money deposited upon an illegal wager, laid on a future event, may be recovered back again before the period of time has elapsed, on the expiration of which the decision of the wager depends. *Aubert v. Walsh.* 377  
And see *Busk v. Walsh, post.* vol. 4.

INDEBITATUS ASSUMPSIT.

*Indebitatus Assumpsit* lies for goods, which the defendant had by fraud procured the plaintiff to sell to an insolvent, and which the defendant had gotten into his own possession, for he could not set up the sale, because his own fraud had procured it, and the mere possession, unaccounted for, raises an *assumpsit* to pay. *Hill v. Perrott.* 274

INFANT.

1. In *assumpsit* a plea in abatement that the defendant made the promise jointly with another, is supported by evidence that the promise was made by the defendant jointly with an infant. *Gibbs v. Merrill.* 307
2. It is for the plaintiff to plead and prove that the infant has avoided his promise, if he would reduce the joint contract to a sole contract. *ib.*

INSOLVENT DEBTOR,

See PLEADING, V. 1.

INSURANCE.

- I. Of the validity of the insurance.
- II. Of the effect of a valid insurance.
- III. Of the acts of the insured.
- IV. Return of premium.
- V. Of the construction of particular expressions in a policy.
- VI. Of the relative rights of assured, broker, and underwriter.

1. An

## I.

1. An insurer is bound to communicate to the underwriters any intelligence he has, which may affect his choice whether he will insure at all, and at what premium he will insure. *Lynch and Another v. Hamilton.* 37
2. Whether in fact true or false. *ib.*
3. If a ship is advertised to be in danger, and the insurer effects a policy on ship or ships, knowing that the ship in danger is one of them, without stating the ship's names, this is a concealment which avoids the policy. *ib.*
4. Although the rumour was false. *ib.*
5. If an insurer effects a policy on ship or ships, knowing their names, but not communicating them, *semble* that the policy is void; such an insurance being tantamount to a representation that he does not know by what ships the goods will come. *ib.*
6. It is not necessary to disclose to the underwriter on a policy at and from London, whether the ship has sailed or not. *Fort v. Lee.* 381
7. The statute 42 G. 3. c. 77. has repealed the necessity of a licence from the South Sea Company or East India Company, for ships passing through the Straights of Magellan or round Cape Horn, and trading in the Pacific Ocean, from Cape Horn to 180 degrees West longitude from London. *Jacob v. Janzen.* 534
8. Whether they combine fishing with their trading or not. *ib.*
9. A wager policy is a lawful contract, except so far as it is prohibited by the statute 19 G. 2. c. 37. 515
10. A licence to H. S. a British merchant, that a ship may go to an hostile port, and bring home a cargo of goods, authorizes the importation of such goods, being the property of an alien enemy, subject of that hostile country, and therefore authorizes him to insure and enforce his contract of insurance in our courts. *Morgan v. Oswald.* 554
11. If the defence upon a policy be, that the licence requires the date of the ship's clearance from an hostile port to be indorsed thereon, and that it is not truly indorsed, it is incumbent on the defendant to prove what a clearance is, and the discrepancy between the real

date of the clearance, and the date indorsed. 554

12. If the date be indorsed as the 17th, and the real date of the clearance be the 20th, *semble* that it is a substantial compliance with the condition. *ib.*
13. *Quare*, whether a clearance be any single document, or the collection of all the papers necessary to enable a ship legally to sail. *ib.*

## II.

1. Upon a policy from London to Trinidad or the Spanish Main, with liberty to call at all or any of the West India islands or settlements, and with liberty to touch and stay at any ports or places whatsoever and wheresoever, the assured must take all the ports at which he touches, in the same succession in which they occur in the course of the voyage insured. *Gairdner and Another v. Senhouse.* 16
2. But if he is lost in steering for an island not in the outward course of his voyage to Trinidad, it is a question for the jury to consider, whether he had not abandoned the intention of going to Trinidad, and restricted himself to the residue of the voyage only. *ib.*
3. If the ports of call are named in a policy in a successive order, the ship must take them in the same succession in which they are named. *ib.*
4. If they are not named in any order in the policy, they must be taken in the order in which they occur in the usual and most convenient and practicable course of the voyage, not according to the shortest geographical distances. *ib.*
5. Where goods are shipped on an invoice, an average loss upon a policy must be calculated upon the invoice price, and not upon the price of the market at which the damaged goods are arrived. *Waldron and Another v. Coombe.* 163
6. If a neutral vessel be insured on a voyage on which it is notoriously necessary to carry simulated papers, in order to elude one of the belligerents, whether permission to carry them must be expressed in the policy, *quare.* *Sael v. Lacy.* 385
7. Liberty to touch at a port for any purpose

- pose whatever, includes liberty to touch for the purpose of taking on board part of the goods insured. *Voolett v. Altnutt.* 419
8. If a *British* subject has an interest in any part of a cargo on a valued policy, he may recover to the extent of the policy on a count averring interest in himself, if he proves some interest, although alien enemies may be interested in other parts of the cargo. *Feise and Another v. Aguilar.* 506  
*Confer Cohen v. Hannam, 5th July 1813, post. vol. 5.*
9. A sentence condemning as enemy's property a cargo which the master had barratrously carried into an enemy's blockaded port, although it may be conclusive evidence that the cargo was an enemy's property at the time of the capture and condemnation, does not disprove the allegation that the cargo was lost by the captain's barratrously carrying the cargo to places unknown, whereby the goods became liable to be and where confiscated. *Goldschmidt v. Whitmore.* 508
10. A wagering policy and a policy on interest, are contracts distinct in their nature and incidents. *Cousins v. Nantes and Another.* 513
11. It must appear on the face of the policy, of which species the contract is. *ib.*
12. If the policy be in the common form, it is a policy on interest. *ib.*
13. If it be a policy on interest, the declaration must aver in whom the interest is vested. *ib.*
14. A wager policy is a lawful contract except so far as it is prohibited by the statute 19 G. 2. c. 37. 515
3. A ship cannot legally proceed without convoy from port to port to join convoy, unless a bond has been given that she shall not sail without convoy. 131
4. A neutral vessel is not sea-worthy, unless she is provided with documents to prove her neutrality. *Steel v. Lacy.* 285
5. Although the production of those documents would, if she had been captured by one particular belligerent, have rendered her liable to condemnation under an ordinance of that power. *ib.*
6. An *American* bound from *London* to *Riga*, was taken by the *Danes*, and condemned for circumstantial reasons, and, amongst others, the want of a sea-passport and muster-rolls; she was provided with false clearances from *Bergen*, but they were not produced. Her sea-passport would have proved she had come from *London*, which, under the *Berlin* decree, would be a ground of condemnation by the *French*. Held, that although it would subject her to this risk, she ought not to be without those documents which would prove her neutrality with respect to other belligerents. *ib.*
7. A ship is sea-worthy, if she is sufficiently furnished for the service in which she is for the present time engaged. *Annan v. Woodman.* 299
8. Therefore a ship much out of repair is sea-worthy in harbour, and is protected under the word "at." *ib.*
9. And as a full complement of men is not necessary in harbour, she does not cease to be sea-worthy for want of a crew, till she sails on a voyage without a crew. *ib.*

### III.

See CONVOY. 1, 2, 3.

1. A ship licensed to sail without convoy, provided she is armed with a certain force, must take that force on board before she breaks ground. *Hinckley v. Walton.* 131
2. A ship licensed to sail without convoy with a certain force, and clearing out without giving bond to sail with convoy, and without having the force required, cannot legally go round from her port of clearance to a port of convoy. *ib.*

### IV.

See INSURANCE, III. 7, 8, 9.

If a ship sea-worthy to lie in port, sails without being rendered sea-worthy for the voyage, upon a policy "at and from," there can be no return of premium. *Annan v. Woodman.* 299

### V.

1. If a ship hove down on a beach within the tide-way, to repair, be thereby bilged and



and damaged, it is not a loss occasioned by the perils of the sea. *Thompson v. Whitmore.* 227

2. Liberty to touch at a port for any purpose whatever, includes liberty to touch for the purpose of taking on board part of the goods insured. *Violet v. Allnutt.* 419
3. A warranty against capture in the ship's port of discharge, does not include capture in the open sea on the outside of the port, by a force issuing from the port of discharge. *Mellish v. Staniforth.* 499

## VI.

1. Although generally an underwriter having subscribed a policy, and thereby confessed the receipt of the premium, is estopped from afterwards claiming the premium against the underwriter, yet, where by the fraud of the assured, the underwriter is induced to give credit for the premiums to the broker, and the broker to give credit to the assured, the underwriter is entitled to receive the premiums from the assured. *Foy v. Bell.* 493
2. An underwriter, after executing a policy, and giving credit to the broker for the premium, may recover the premium against the underwriter, if it appear that the assured, to cover a balance due from the broker to himself, procured him to effect the insurance, debiting the assured in account with the premiums, and lodging the policies in the hands of the assured, to enable him to receive the losses. *Mavor v. Simeon.* 497

## INTEREST OF MONEY.

1. Upon a writ of error being nonprossed, if the cause of action in the court below was not a debt which carried interest, the court of error will not allow interest on the sum recovered by the judgment, unless it is distinctly proved, or admitted, that the writ of error was brought for delay. *Saxelby v. Moor.* 51
2. Although there are strong circumstances, from which it may be inferred that it was brought for delay only. *ib.*
3. Where goods are sold, to be paid for by a bill of a certain date, the price shall

bear interest from the day when the bill would have been due, and may be recovered as damages, on a special count for the non-delivery or non-payment of the bill. *Slack v. Lowell.* 157

4. But if, in such a case, upon a general count for goods sold and delivered, the jury give the price and interest as damages, the Court will not therefore set aside the verdict. *ib.*

## IRISH JUDGMENT,

*See* JUDGMENT, 1, 2.

## J

## JOINT AND SEVERAL COVENANTS,

*See* COVENANT, 3.

## JOINT-TENANTS,

*See* NOTICE TO QUIT, 3.

## JOINT TORTS.

1. If the plaintiff in an action commenced against several tort-feasors, accept of a sum of money from one of them, and drop that action, *semble* that he cannot sue the others. *Dufresne v. Hutchinson.* 117
2. If several military officers falsely imprison a man, who recovers in trespass against one of them, he cannot afterwards sue another of them for the same wrong. *Per Lawrence, J. Warden v. Bailey.* Vol. 4. p. 88. *Contra, per Willes, C. J. ib.*

## JUDGMENT.

1. The assignee of an *Irish* judgment by cognovit may sue in this country in his own name. *O'Callaghan v. Marchioness of Thomond.* 82
2. The *Irish* statutes 9 G. 2. and 25 G. 2., which permit conusees of judgments to assign them, and the assignees to sue in their own names, are confined to judgments upon cognovits. *ib.*
3. Assumpsit lies on an *Irish* judgment since the *Union.* *Vaughan v. Plunkett.* 85. n.

## LANDLORD

**L**

**LANDLORD AND TENANT,**

See AGREEMENT, 2, 3, 4, 5, 8. COVENANT, 1, 4, 5, 6, 8. DISTRESS, 1. EXECUTION, 2. FORFEITURE, 1, 2, 3. MORTGAGE, LEASE, 1, 2, 3, 4, 5.

If a landlord direct a tenant, who is overseer of the poor, to pay on the landlord's account rates irregularly assessed on him, and promises that the levies shall eat out the rents, the tenant may set them off, or prove them as payment, in an action for use and occupation. *Roper v. Bumford.* 76

**LEASE,**

See EVIDENCE, III. 1, 2.

1. Whether an instrument shall be a lease, or only an agreement for a lease, depends on the intention of the parties, as it is to be collected from the instrument. *Morgan, on the Demise of Dowding, v. Bissell.* 65
2. Strong circumstances of inconvenience apparent on the instrument, if it should be construed as a lease, indicate the intention of the parties that it should be agreement only. *ib.*
3. Such as a stipulation that out of the rent mentioned, a proportionate abatement should be made in respect of certain excepted premises; for until that was apportioned, the lessor could not distrain. *ib.*
4. And a stipulation that the tenant should hold at and under all usual covenants as between landlord and tenant where the premises are situate; for it may be disputable what are usual covenants. *ib.*
5. The defendant agreed by parol to rent a house, as tenant from year to year, for the residue of a term, which was three years and three quarters: he held for three years and one quarter, and quitted. Ruled, that though perhaps he might have quitted without notice at the end of three years, yet the remaining longer implied a contract to pay rent for the residue of the term. *Sauvage v. Dupuis.* 410
6. An agreement to grant a lease contains no implied engagement for general

warranty, nor for delivery of an abstract of the lessor's title. *Gwillim v. Stone.* 433

**LICENCE TO TRADE.**

1. An order of council permitting the consignee of goods coming from an enemy's country without a licence, to land them here, on condition of immediately re-exporting them, does not so legalize the voyage, as to enable the master of the ship to recover his freight. *Muller v. Gernon.* 394
2. Under a licence to *British* brokers resident here, that a ship bearing any flag may import from an enemy's country; to whomsoever the property may appear to belong, three *British* subjects not named in the licence, one of whom resides in a hostile country, may import from another hostile country to this. *Fayle and Another v. Bourdillon.* 546
3. And the agent who effected the policy, may recover in trust for three *British* partners, one of whom, at the time of the action, resides in an alien enemy's country. *ib.*
4. A licence to *H. S.*, a *British* merchant, that a ship may go to an hostile port, and bring home a cargo of goods, authorizes the importation of such goods, being the property of an alien enemy, subject of that hostile country, and therefore authorizes him to insure and enforce his contract of insurance in our courts. *Morgan v. Oswald.* 554

**LIMITATION OF ACTIONS.**

"I owe you not a farthing, for it is more than six years since," is not to be left to the jury as evidence of an admission, to take a debt out of the statute of limitations. *Coltman v. Marsh.* 380

**M**

**MARRIAGE,**

See DEED, 1.

**MEADOW LAND,**

See COVENANT, 4, 5, 6.

**MISNOMER,**

## MISNOMER,

See PLEADER, V. 3. VARIANCE, 1.

## MISPRISION,

See OFFICER.

## MISTAKE,

See DEED, 1.

## MONEY PAID,

See BROKER, 1.

## MONEY HAD AND RECEIVED,

See ANNUITY, 1. ILLEGAL CONSIDERATION, 4.

## MORTGAGE.

The mortgagee of a lease has the same title to relief against an ejectment for non-payment of rent, and upon the same terms, as the lessee against whom the recovery is had. *Doe ex dem. Whitfield v. Roe.* 402

---

N

If a vessel is damaged by another running foul of it, and the jury find a verdict for the plaintiff, the Court will not send the case to a new trial, because there may be some ground to believe that the plaintiff was negligent in navigating his vessel, as well as the defendant. *Collinson v. Larkins.* 1

## NOTICE, SERVICE OF.

Where a statute requiring any notice to be served refers to the time of pleading, or other legal proceeding in a suit, service on the party's attorney is good service. *Howard v. Ramsbottom.* 530

## NOTICE OF ACTION.

Notice of action against a custom-house officer for breaking the plaintiff's dwelling-house in C. Street, in the parish of G., is not a sufficient notice of the plaintiff's place of abode, within the statutes 23 G. 3. c. 70. s. 30. and 24 G. 3. sess. 2. c. 47. s. 35. *Williams v. Burgess.* 127

NOTICE OF DISPUTING  
BANKRUPTCY, HOW TO BE  
SERVED,

See PRACTICE, IV. 10.

## NOTICE TO QUIT.

1. A notice desiring the defendant to "quit the premises which you hold under me, your term therein having long since expired," does not recognize a subsisting tenancy from year to year subsequent to the term, but is a mere demand of possession. *Doe d. Goddell v. Inglis.* 54
2. If the bargainee of tithes for one year underlet them to the several occupiers of the land, no notice to determine the underletting needs to be given by the bargainee of the same tithes for the following year. *Cor v. Brain.* 95
3. If four joint-tenants jointly demise from year to year, such of them as give notice to quit may recover their several moieties in ejectment on their several demises. *Doe, ex dem. Whayman and Others, v. Chaplin.* 120

---

O

## OFFICER.

1. Watchmen and beadies have authority at common law to arrest and detain in prison for examination, persons walking in the streets at night, whom there is reasonable ground to suspect of felony, although there is no proof of a felony having been committed. *Lawrence v. Hedger.* 14
2. It is a high misprision in the officers of the inrolment office to alter the inrolment of a memorial of an annuity deed by making it to correspond with the memorial, at the instance of the grantee, without the sanction of the Court of Chancery for the amendment. 540

## OUTLAWRY.

1. The Court of Common Pleas will reverse an outlawry upon motion, on error in fact sworn to. *Beauchamp v. Tomkins and Another.* 114
2. *Semble* that a bankruptcy and certificate is no ground of discharge of a prisoner

soner in custody on an *utlagatum capias*. 114

OVER-RENT,

See COVENANT, 4, 5, 6.

P

PARISH,

See VARIANCE, 1.

PERPETUAL CURACY.

The right to appoint a perpetual curate is parcel of the rectory, and cannot pass in a recovery by the denomination of a curacy, as distinct from the rectory. *Horne, demandant; Lodge, tenant; Preston, vouchee.* 462

PLEADING.

- I. *Of the form of actions, and joinder of actions.*
- II. *Of the parties thereto.*
- III. *When particular matters may be pleaded.*
- IV. *Of certainty in pleading.*
- V. *Of the manner of pleading in general.*
- VI. *Of title.*
- VII. *Of surplusage.*
- VIII. *What cured by verdict.*

IV.

An averment of an undertaking to carry goods to R. to be delivered to C. B. to be paid for on delivery, shews with sufficient certainty that the price of the goods was to be paid by C. B., the consignee, to the carrier. *Jacobs v. Nelson.* 423

V.

And see INSURANCE, II. 3.

1. To a plea of discharge under an insolvent debtor's act, the plaintiff replied by denying the truth of all the facts collectively, which were sworn to by the defendant in the oath which he took, as required by the statute, in VOL. III.

order to obtain his discharge, without singling out any in particular: held that although this mode of pleading might be bad on a special demurrer, it did not tender an immaterial issue. *Winstanley v. Head.* 237

2. Plea justifying a libel which stated the grounds on which the plaintiff was dismissed the *East India Company's* service, on the ground that the Company ordered the defendant, as governor in council, to dismiss the plaintiff for the reasons assigned: the plea does not shew a sufficient justification for publishing the causes of dismissal. *Oliver, Esq. v. Lord W. C. Bentinck.* 456

3. If a person enter into a bond by a wrong christian name, and be sued on such bond, he should be sued by such name. A declaration against him by his right name, stating that he, by the wrong name, executed the bond, is bad. *Gould and Others, Administrators of Robinson v. Barnes.* 504

4. A declaration upon a policy effected upon an interest in the thing insured, must aver in whom the interest is vested, whether it be on a foreign or British ship. *Cousins v. Nantes.* 513
5. No averment of interest is necessary on a wagering policy. *ib.*

POOR RATES,

See LANDLORD AND TENANT, I.

POWER.

The testator devised certain lands, part mortgaged in fee, and part unincumbered, to trustees and their heirs, to pay debts in aid of the personal estate, and devised the surplus, and all his other lands, &c. to his first and other sons successively for life, with successive remainders to trustees and their heirs, to preserve subsequent estates during the lives of the several tenants for life, with several remainders successively to the first and other sons of the bodies of the testator's several sons, in tail male, with like remainders to his daughter for life, to trustees, &c. and to her first and other sons successively in tail male: with a proviso that each of the testator's sons, as he came into possession, might from time to time grant or appoint all or any of the lands F f whereof

whereof he should be so seised and possessed, to *trustees*, on trust by the rents and profits to pay a jointure to any wife, &c. for the term of each such wife's natural life only. There were also powers by deeds to charge the lands with younger children's portions, and to lease for 21 years. While the mortgages remained out-standing, and the trusts for payment of debts unperformed, the eldest son, by deed, reciting the will and power, conveyed lands to *trustees and their heirs*, on trust by the rents and profits to raise and pay a jointure to his wife, during her natural life only; and charged the lands with portions for younger children, if any; which deed also contained a covenant for quiet enjoyment against the seller and testator, during the wife's life: this Court held, that by such deed the trustees of the jointure took no legal estate. *Wykham v. Wykham and Others.* 316

## PRACTICE.

- I. Relative to process.
- II. Arrest, detainer, bail, and appearance.
- III. Pleadings, and bill of particulars.
- IV. Trial, enquiry, and evidence.
- V. Judgment and reference to the prothonotary.
- VI. Execution.
- VII. Staying and setting aside proceedings.
- VIII. Costs.
- IX. Waver of irregularity.
- X. Writ of error.
- XI. Of motions.

## I.

And see IV. 10. AFFIDAVIT, I. OUT-LAWRY.

- 1. The Court set aside a *distringas* executed upon the goods of the wife of a surgeon in the navy, serving on a foreign station, the debt not being contracted in the wife's trade. *Wilson v. Spilsbury.* 145
- 2. Delivery of process, sealed up in a letter, in the absence of the person to whom it is addressed, is no service but from the time when the letter is opened. *Arrowsmith v. Ingle.* 234

- 3. A writ may be served on the day on which it is returnable, and notice of declaration may be given at the same time. *Haymes v. Jones.* 404

## II.

- 1. If a plaintiff knowingly arrests a married woman, the Court will make him pay the costs of the motion for her discharge. *Wilson v. Serres.* 307
- 2. The defendant in putting in bail, misinstructed the filazer as to the christian name of one of the two plaintiffs: the plaintiff's attorney thereupon swore that there was no bail in that action, and moved that the defendant's attorney might pay debt and costs for superseding the defendant. The Court discharged the rule with costs to be paid by the attorney so swearing. *Clarke and Another v. Gorman.* 492

## III.

- 1. If the defendant plead a subtle plea to ensnare the plaintiff, the Court will permit the plaintiff to sign judgment, unless the defendant will amend. *White and Others v. Howard.* 339
- 2. In an action on a deed made beyond the seas, the defendant relying in some of his pleas on matters of defence which necessarily imported the execution of the deed, the Court would not permit him to plead *non est factum*. *Laughton v. Ritchie.* 285
- 3. If a defendant files two pleas at several times on the same day, in order to mislead the plaintiff by the second plea, the plaintiff may sign judgment. *Samuels v. Dunne.* 386
- 4. Although a defendant conducts his cause in person, if he files a special plea, it is a nullity, unless it be signed by a serjeant or counsel. *ib.*

## IV.

- 1. When there has been but a short time for investigating a question of real property, of a doubtful and obscure nature, and of great value, although conflicting evidence has been left to the jury, and the Court does not think their verdict wrong, yet if the inheritance is to be bound

- bound for ever by the verdict, the Court will grant a new trial on payment of costs. *Swinnerton v. Marquis of Stafford*. 91
2. If upon the Judge directing the jury to give nominal damages, the plaintiff elects to be nonsuited, he will not be permitted to have a new trial upon the ground of a misdirection of the Judge in that point. *Butler v. Dorant*. 229
3. A retainer in a cause, without a brief, does not authorize counsel to withdraw a record at *nisi prius*. *Ahitbol v. Benedetto*. 225
4. Where the circumstances of a case had been fully put into the possession of a jury, who had twice found a verdict the same way, although there was conflicting evidence, and although the Judge who last tried the cause thought the evidence against the verdict preponderated, the Court refused to grant a second new trial. *Swinnerton v. Marquis of Stafford*. 232
5. A motion to put off a trial in *London* or *Middlesex*, on account of the absence of a witness, cannot be made when there is not time to shew cause within the term, if the party applying had it in his power to come earlier. *Anonymous*. 315
6. If the same special jurymen are struck to try several causes on the same question, and the Court being dissatisfied with the verdict in the first, direct it to abide the event of another cause, they will also, on motion, discharge the same special jurymen from trying the second cause. *Mayor, &c. of Doncaster v. Coe*. 404
7. A witness may object to answer a question, which he thinks will tend to his crimination, though the answer would not lead to an immediate conclusion of guilt. *Cates v. Hardacre*. 424
8. If a cause, which is meant to be defended, is called on, and tried as an undefended cause, in consequence of the defendant's attorney neglecting to deliver his briefs, the Court will grant a new trial, compelling the defendant's attorney to pay the costs as between attorney and client, out of his own pocket. *De Bouigny v. Peale*. 484
10. The notice of intention to dispute a

bankruptcy, required by st. 49 G. 3. c. 121. s. 10. may be served on the assignee by delivery to his attorney. *Howard v. Ramsbottom, Assignee of George*. 526

11. But service, by leaving the notice with a maid servant at the dwelling-house of the assignee, is not sufficient service. *ib.*

12. If a junior counsel at *nisi prius* takes a well-founded objection for the defendant, which his leader gives up, the Court will not entertain it, in discussing a rule for a new trial or nonsuit on another ground. *Winter v. Mair*. 531

## V.

And see PRACTICE, III. 3.

Upon a case directed out of Chancery, the Court will not solve any questions that are not expressly put in the case. *Morgan v. Horseman*. 241

## VII.

And see WARRANT OF ATTORNEY, 2, 3, 4.

1. Any person other than the defendant making an affidavit of merits to set aside an interlocutory judgment, must either swear that he is the defendant's attorney's managing clerk, or the defendant's attorney. *Neesom v. Whytock*. 403

2. The Court will not, at the instance of the defendant in an ejectment, interfere against a plaintiff who lays a demise by the assignees of a bankrupt without their permission, they having given up the property to the bankrupt, and the plaintiff claiming under him. *Doe, on the demise of Vine and Others, v. Figgess and Sloper*. 440

3. The Court will not set aside a judgment and execution in ejectment, in order to let in a person to defend, though he make an affidavit setting forth a clear title, and offer to pay costs. *Doe, ex dem. Ledger, v. Roe*. 506

## VIII.

1. The costs of a witness coming from beyond sea, for some years past were allowed only from his coming within  
F f 2 the

the jurisdiction of this court. *Haggard v. Allnutt.* 379

2. But the practice is now altered. *Cotton v. Witt*, vol. 4. p. 55.

3. The only mode of recovering the costs of a nonsuit upon the merits in ejectment, is to serve the lessor of the plaintiff with a copy of the consent rule, and allocatur of costs, and to attach him if he does not obey. *Doe, ex dem. Prior and Wife, v. Salter.* 485  
*Vide Doe, ex dem. Pearkes, Widow, v. Dawson, post. Hil. Term 1812, vol. 4.*

### X.

*And see BAIL, V. 1.*

1. If a writ of error is sued out before final judgment, but the allowance not served until after the writ of error is spent, the plaintiff may afterwards regularly sign final judgment. *Stevens v. Ingram.* 384

2. Upon a writ of error being nonprossed, if the cause of action in the court below was not a debt which carried interest, the court of error will not allow interest on the sum recovered by the judgment, unless it is distinctly proved, or admitted, that the writ of error was brought for delay. *Saxelby v. Moor.* 51

3. Although there are strong circumstances from which it may be inferred that it was brought for delay only. *ib.*

### PRESCRIPTION,

*See EVIDENCE, II. 3, 4, 5.*

### PRESUMPTION,

*See EVIDENCE, II. 3, 4, 5.*

### PRIVILEGE,

*See ATTORNEY, 1.*

### Q

### QUANTUM VALEBANT,

*See AGREEMENT, 1.*

### QUIET ENJOYMENT,

*See COVENANT, 1.*

### R

### RANSOM.

1. The plaintiff and defendant being taken prisoners in *Portugal*, jointly solicited and obtained the liberation of themselves and the ransom of the defendant's ship, contrary to 45 G. 3. c. 72.; to effect which the plaintiff lent money to the defendant, who afterwards gave him a bill for the amount: held that the plaintiff could not recover on the bill. *Webb v. Brooke.* 6

2. It is competent to arbitrators to inquire whether a ransom for which the plaintiff seeks to be repaid, were justified by an extreme necessity, within the statute 45 G. 3. c. 72. s. 16. *Miller v. Robe.* 401

### RECEIVER—under the Court of Chancery,

*See COVENANT, 2.*

### RECOVERY,

*See DEED, 1.*

1. A recovery may be amended by striking out the voucher of a vouchee, whose acknowledgment was taken without a *dedimus*. *Rawlings, demandant; Price, tenant; John Tom and Mary his wife, and William Tom and Mary his wife, first vouchees; John Tom, the younger, second vouchee.* 59

2. Recovery amended by inserting a mesuage recently built upon part of the premises. —, *demandant; Shaw, tenant; Hawkins, vouchee.* 74

3. If a warrant of attorney for suffering a recovery be acknowledged in a part of the *East Indies*, far distant from the residence of any notary public or *British* magistrate, an affidavit of the acknowledgment, made before a *British* consul or agent there, will suffice. *Domville, demandant; Kinderley, tenant; Collier, vouchee.* 275

4. The

4. The warrant of attorney to suffer a recovery of lands in a county-palatine, cannot be taken before an attorney who is an attorney only of the court palatinate of great sessions. *Blagrove, demandant; Owen, tenant; Blagrove and Others, vouches.* 302
5. Recovery amended by substituting a certain part of a parish which lay within a liberty, for the other part of the parish, which lay within a borough. *Payne, demandant; Nathaniel, tenant; Hodges, vouches.* 396
6. A recovery 98 years old, amended by inserting a manor and tithes without affidavit of intention that they should pass, the intention being manifest from the deeds, and the possession having gone accordingly. *Tennyson, demandant; Goulton, tenant; Raisby, vouches.* 408  

Though there was no other evidence of the existence of a manor, than the mention of it in an old deed, and the appointment of a gamekeeper. *ib.*
7. The Court refused to amend a recovery by changing the county, the premises lying in a parish which ran into two counties, and lying wholly in the county omitted, and no part in the county mentioned. *Anonymous.* 418  

And see *Gill, plaintiff; Yates, defendant, acc. post. Mich. term, 1812. Contra, Rushleigh, demandant; Lee, tenant; Smith, vouches. Easter term, 1813. post. vol. 5.*
8. The Court permitted a recovery to be amended by inserting an advowson which had passed by the general word hereditaments, but refused to insert a curacy, because the right of nominating a perpetual curate was incident to, and parcel of the rectory. *Horne, demandant; Lodge, tenant; Preston, vouches.* 462

RE-ENTRY,

See FORFEITURE, 4.

REFERENCE, ORDER OF.

1. If upon a reference, either party is precluded by the terms of the rule from going into evidence of that which he is desirous to try, his remedy is to move

to set aside the rule of reference; but he cannot impeach the award. *Doe ex dem. Lord Carlisle, v. Bailiff and Burgesses of Morpeth.* 378

2. After an order of reference has been made with the consent of counsel and attorney, the Court will not set it aside on an affidavit by a party expressly denying his attorney's authority to refer, though the application be made before any step taken by the arbitrator, excepting the appointment of a meeting. *Filmer v. Delber.* 486

REGULA GENERALIS.

Bail in 1000*l.* beyond the debt sworn to, is sufficient. *Mich. T. 51 G. 3.* 341  
 Bail to justify only at the sitting of the Court. *Easter Term 51 G. 3.* 569

RENT,

See DISTRESS. MORTGAGE, 1. EXECUTION, 2.

RETAINER.

A retainer in a cause, without a brief, does not authorize counsel to withdraw a record at *nisi prius*. *Ahitbol v. Benedetto.* 485

REVOCATION,

See DEED, 1.

S

SATISFACTION.

If the plaintiff in an action commenced against several tort-feasors, accept of a sum of money from one of them and drop that action, *semble* that he cannot sue the others. *Dufresne v. Hutchinson.* 117

SET-OFF,

See LANDLORD AND TENANT, 1.

1. Although generally an underwriter, having subscribed a policy, and thereby confessed the receipt of the premium, is



is estopped from afterwards claiming the premium against the underwriter; yet, where by the fraud of the assured, the underwriter is induced to give credit for the premiums to the broker, and the broker to give credit to the assured, the underwriter is entitled to receive the premium from the assured. *Foy v. Bell.* 493

2. Action for freight, and cross action for unliquidated damages against a foreign seaman. The Court refused to permit the freight to be paid into court, as a fund liable to payment of the damages when ascertained. *Sherborne v. Siffkin.* 525

### SHIP'S REGISTER.

1. If a ship, registered at one port, is transferred, while at sea, to a purchaser residing at another port in this kingdom, the proper mode of perfecting the transfer within the requisitions of the ship register acts, is, by a registration *de novo* in her new port. *Hubbard v. Johnstone, Assignee of Ward, a Bankrupt.* 177
2. And it is not necessary for a ship to return to her former port, in order to have a memorandum of the transfer indorsed on her certificate of registration. *ib.*
3. Nor is it necessary for the purchaser to send a copy of the bill of sale to her former port. *ib.*
4. Nor to indorse a memorandum of the transfer on her certificate of registry within ten days after the ship returns to England. *By five Judges against two.* *ib.*
5. The property of a ship vests in the purchaser instantly upon the execution of the bill of sale, not from the time of compliance with the register acts, defeasible, nevertheless, upon failure to comply with these acts. *Per Wood, B.* *ib.*
6. The statute 34 G. 3. c. 68. s. 16. applies to the sale of the entirety of a ship in the same port, as well as to the sale of a share or shares therein. *ib.*
7. The ship-register acts, so far as they apply to defeat titles; and create forfeitures, are to be construed strictly, as

penal, not liberally, as remedial laws. *Per Wood, B. and Heath, J.* 220

### SLANDER OF TITLE.

1. In an action for slander of title, it is necessary for the plaintiff to prove malice in the defendant. *Smith v. Spooner.* 246
2. A lease, in which was a proviso for re-entry if the rent were in arrear 28 days, being exposed to sale by the assignee, and rent being then in arrear, the lessor announced at the sale that the vendors could not make a title, in consequence of which bidders who came to buy went away. He afterwards offered 100*l.* for the lease, but subsequently recovered the premises in ejectment. Held, that no action for slander of title lay against him. *ib.*
3. If the lessee covenant that if the rent be unpaid 28 days, the lessor may re-enter, whether a demand of rent be first necessary, *quare.* *ib.*
4. In an action for slander of title, the defendant may give evidence on the general issue, that he spoke the words claiming title in himself. *ib.*

### SOUTH SEA COMPANY.

The statute 42 G. 2. c. 77. has repealed the necessity of a licence from the South Sea Company or East India Company, for ships passing through the Straights of Magellan, or round Cape Horn, and trading in the Pacific Ocean from Cape Horn to 180 degrees West longitude from London. *Jacob v. Jansen.* 534

2. Whether they combine fishing with their trading or not. *ib.*

### SPECIAL VERDICT.

It is the province of a special verdict to find facts, not evidence. *Hubbard v. Johnstone, Assignee of Ward, a Bankrupt.* 209

### SPIRITUOUS LIQUORS,

See ILLEGAL CONSIDERATION, 2, 3.

### STATUTE OF FRAUDS,

See AGREEMENT, 6, 7.

### STATUTE

STATUTE OF LIMITATIONS,

See LIMITATION OF ACTIONS, 1.

STATUTES.

JAC. 1.

2. *ulgo* 1. c. 15. s. 2. (Act of bankruptcy by deed.) 242

3. c. 8. (Bail in error.) 383

WM. 3.

4 & 5. c. 18. (Outlawries.) 141

7 & 8. c. 22. (Ship's register.) 151

9 & 10. c. 25. (Stamps.) 116

ANNE.

8. c. 14. (Rent under execution.) 400

9. c. 21. (*South Sea Company*.) 538

GEO. 2.

5. c. 18. s. 2. (Attorney.) 167

5. c. 30. (Bankrup.) 47. 478

9. c. 5. *Irish stat.* (Judgment.) 82

11. c. 19. s. 15. (Rent due to executors of tenant for life.) 331

19. c. 37. (Policies of insurance.) 515

24. c. 40. s. 12. (Spiritous liquors.) 226

24. c. 44. s. 1. (Borough magistrates.) 167

25. c. 14. *Irish stat.* (Judgment.) 83

GEO. 3.

17. c. 26. s. 5. (Annuity.) 541

23. c. 70. s. 30. (Notice of action.) 127

24. *sess.* 2. c. 47. (Notice of action.) *ib.*

26. c. 60. s. 3. (Ship's register.) 183

34. c. 68. s. 16. (Ship's register.) 177

35. c. 92. (*Southern whale fishery*.) 535

38. c. 57. (*Southern whale fishery*) *ib.*

42. c. 77. (Repeal of *South Sea* monopoly.) 534

43. c. 90. (*Southern whale fishery*.) 538

45. c. 72. s. 16. (Kanon) 461

47. *sess.* 1. c. 23. (*South American* dominions.) 538

47. c. 57. s. 5. (Convoy.) 132

47. c. 149. s. 8. (Stamps.) 116

49. c. 121. (Bankrupt.) 47. 86

— s. 10. 526

SUGGESTION,

See WARRANT OF ATTORNEY, 1.

T

TENANT FOR LIFE.

Whether the executors of a deceased jointress can recover a fractional part of a rent charge charged on estates conveyed to trustees and their heirs, *pur auter vie*, in trust to raise and pay the jointure, *quære*. *Wykham v. Wykham and Others.* 316

TENANT FROM YEAR TO YEAR,

See LEASE, 3.

TENDER.

A tender admits the contract and facts stated in the declaration: therefore, where a count av-rrred, that in consideration that plaintiff would let to the defendant certain tithes, the defendant agreed to pay 41*l.*, and that the plaintiff did let the said tithes, and did permit the defendant to take them, a tender on all the counts, generally, precluded the defendant from shewing a legal interruption to his taking them, if any such interruption had subsisted. *Cor v. Brain.* 95

TILLAGE,

See COVENANT, 4, 5, 6.

TRESPASS AND FALSE IMPRISONMENT,

See BAIL, 1.

TROVER,

See ACTION ON THE CASE, 2.

V

VARIANCE.

1. In a penal action, if a parish is styled by its popular and well-known name, it is well enough, though that is not the name of consecration. *Williams v. Burgess.* 127
2. In case, an averment that the plaintiff's close at the time of the injury was, and still was, in the occupation of *J. V.* and *H. V.*, is sufficiently proved, if at the time

time of the injury it was in their occupation, though the tenant be since changed before action brought. *Vowles v. Miller.* 137

### VENUE.

1. If the plaintiff retains the venue upon the usual undertaking to give material evidence within the county, yet if the plea and issue joined be such as to render that evidence irrelevant, the performance of the undertaking is dispensed with. *Soulsby, Assignee of Halliday a Bankrupt v. Lee.* 86
2. Thus, if the local evidence be the trading of a bankrupt, or a petitioning creditor's debt within a county, yet if the defendant do not give notice of his intention to dispute the commission under 49 G. 3. c. 121. s. 14., so that the mere production of the commission and proceedings under it proves the trading and petitioning creditor's debt, *semble* that the undertaking needs not to be further complied with. *ib.*
3. The plaintiff falsifying the defendant's affidavit to change the venue, the venue was retained, though the plaintiff could not undertake to give material evidence in *London*, where he had laid it, either venue being inconvenient to one or other of the parties. *Dick v. Norrish.* 464

## W

### WAGERS,

*See* ILLEGAL CONSIDERATION, 4. INSURANCE, I. 14.

### WARRANTY OF TITLE,

*See* AGREEMENT, 8.

### WARRANT OF ATTORNEY,

*And see* RECOVERY, 3, 4.

1. No suggestion is necessary under 8 &

9 W. 3. c. 11., upon a warrant of attorney conditioned for payment by instalments. *Cor v. Rodbard.* 74

2. It is not sufficient that the defeazance of a warrant of attorney shews the amount of the sum secured by the judgment, it must also notice all collateral securities by which it is secured. *Morrell v. Dubost and Another.* 235
3. The rule of Court *Mich. 42 G. 3.* does not require the consideration of a judgment to be indorsed on the warrant of attorney. *Barber v. Barber and Another.* 465
4. If a warrant of attorney be given to confess judgment absolutely for a certain sum, although it be understood between the parties that it is given only to indemnify the plaintiff against his suretyship for a smaller sum, that is not such a defeazance as needs to be indorsed on the warrant of attorney, and the plaintiff needs not to defer execution till the contingency happens. *ib.*

### WATCHMEN AND BEADLES,

*See* OFFICER, 1.

### WAVER.

*See* FORFEITURE, 1, 2, 3.

### WAY,

*See* EASEMENT.

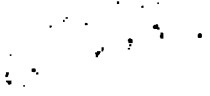
### WAY OF NECESSITY,

*See* EASEMENT, 4.

### WITNESS.

A witness may object to answer a question which he thinks will tend to his crimination, though the answer would not lead to an immediate conclusion of guilt. *Cates v. Hardacre.* 434

END OF THE THIRD VOLUME.



1

1947

1947

